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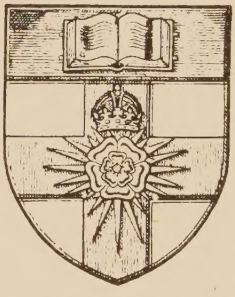

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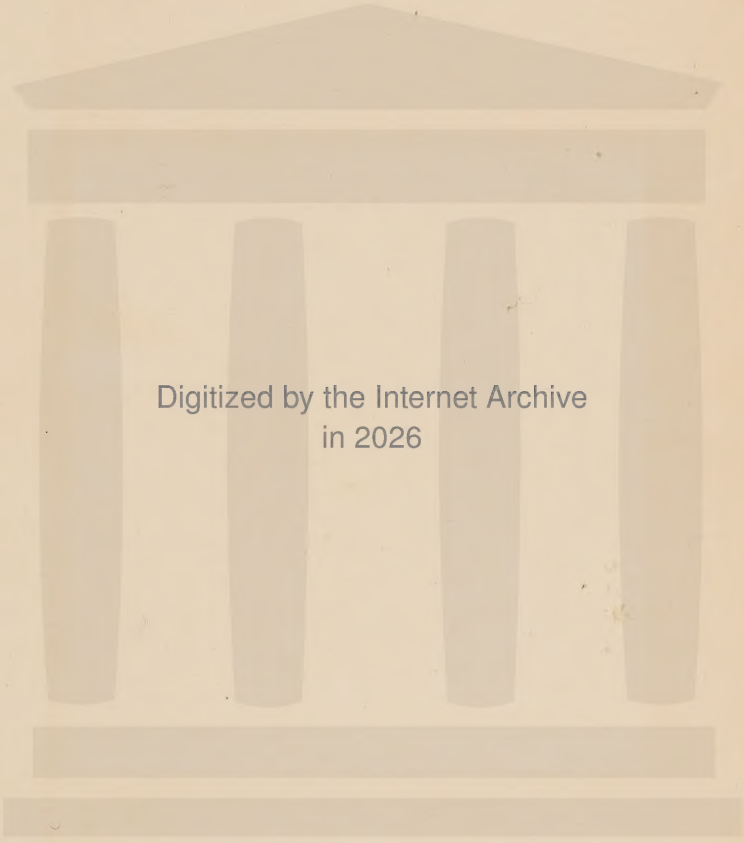

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THE

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CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

LEMON *v.* AUSTIN FRIARS INVESTMENT TRUST, LIMITED.

C. A.
1925
LAWRENCE J.
June 30.
C. A.
July 13, 14.

[1925. L. 1295.]

Company—Debenture—Income Stock Certificates—Certificate of Indebtedness in Sum certain payable out of net Profits—Charge on Profits—Register of Income Stock Certificates—Right of Inspection—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 102.

The defendant company, which carried on the business of financiers, was registered in 1925, as a company limited by shares under the Companies Acts. To raise money for the purposes of its undertaking, the company issued 1,400,000*l.* income stock payable out of profits, of which stock 2100*l.* was subscribed for by and issued to the plaintiffs and registered in their firm name. In the document, called an income stock certificate, issued to the plaintiffs, the company acknowledged its indebtedness to them in that sum payable only out of profits as thereinafter mentioned; and it was provided that three-fourths of the net profits of the company of each year or a sum equal thereto should be applied in or towards paying off the income stock pari passu. By the conditions, subject to and with the benefit of which the certificate was issued, it was stated that the certificate was one of a series and that the stock was to rank pari passu, that the company would keep a register of the certificates with the names, etc., of the registered holders thereof, and power was given to the holders of three-fourths

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in value of the certificates for the time being outstanding to sanction any modification of the rights of the certificate holders which might be proposed by the company.

The plaintiffs, having requested and been refused leave to inspect the company's register, issued a writ claiming a declaration that the certificates were debentures within the meaning of s. 102 of the Companies (Consolidation) Act, 1908, and an injunction restraining the company from interfering with the plaintiffs in the exercise of their statutory right to inspect the register, and moved accordingly for an interim injunction in the terms of the writ:—

Held, by Lawrence J. and the Court of Appeal, (1.) that the certificates fulfilled the primary qualification for a debenture—namely, they contained an acknowledgment of indebtedness, notwithstanding that the debt was only payable in the future and upon the contingency of profits being earned by the company.

(2.) That, as the certificates contained further common characteristic features of a debenture—namely, a charge on assets of the company, although consisting only of a proportion of the profits as and when ascertained and the other indicia above stated, the certificates were debentures within the meaning of s. 102 of the Companies (Consolidation) Act, 1908.

Held, therefore, that all the holders of income stock certificates were entitled to inspection of the register thereof kept by the company in accordance with the conditions: and accordingly, that the plaintiffs were entitled to the injunction they claimed.

MOTION.

The defendant company was registered in 1925, as a company limited by shares under the Companies Acts, 1908 to 1917, its objects being (inter alia) to purchase, subscribe for, underwrite, or otherwise acquire, hold, sell and deal in stocks, bonds, debentures, and other securities. In order to raise money for the purposes of its undertaking the company issued 1,400,000*l.* income stock. Of that issued series 2100*l.* was issued to the plaintiffs, who were registered by the company as the holders thereof in their firm name of Brighten and Lemon; and the certificate which was delivered to the plaintiffs in respect of their holding was in the form following:—

"AUSTIN FRIARS INVESTMENT TRUST, LIMITED.
"(Incorporated under the Companies Acts, 1908 to 1917).
"Capital: 60,000*l.* (divided into 240,000 shares of 5*s.* each).
"Authorized Debenture Issue: 240,000*l.*
"Issue of 1,400,000*l.* of Income Stock payable out of profits.
"No. 38 Income Stock Certificate, 2100*l.*

"1. This is to certify that the above-named company is indebted to Messrs. Brighten and Lemon of Roman Wall House, 1, Crutched Friars, E.C. 3, or other the registered holder for the time being of this certificate, in the sum of two thousand one hundred pounds, payable only out of profits as hereinafter mentioned.

"2. Within two calendar months after the approval of the accounts of the company for each year in annual general meeting, three fourth parts of the net profits of the company of that year, or a sum equal thereto, are or is to be applied in or towards paying off the income stock pari passu. The certificate in writing of the company's auditors as to the amount of the net profits of the company of any year shall be conclusive as to the amount thereof.

"3. As and whenever the company becomes bound to make any payment to the certificate holder, the company shall give notice in writing to such certificate holder, stating the amount to be paid in respect of each certificate and the time and place where the same will be paid, and calling on the certificate holder to attend at such time and place and to produce the certificate, in order that a memorandum of payment may be placed thereon.

"4. At the time and place so fixed the holder of the certificate must attend by himself or his agent and must produce this certificate, and thereupon the sum payable in respect of such certificate will be paid to him or his duly authorised agent, and a note of such payment will be placed on the certificate, which will thereupon be returned unless the payment made satisfies the amount of the certificate, in which case the certificate will be retained by the company.

"5. This certificate is issued subject to and with the benefit of the conditions endorsed hereon, which are to be deemed part of it.

"Dated this 16th day of January, 1925.

"By Order of the Board,

"(Signed) F. W. SEVIN,

"Secretary."

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Amongst the conditions which were indorsed upon that certificate were the following :—

" 1. This certificate is one of a series of like certificates of the company for an amount not exceeding in the aggregate at any one time 1,400,000*l*. The income stock is all to rank pari passu without any preference or priority.

" 2. A register of the certificates will be kept at the company's registered office, wherein there will be entered the names and addresses and descriptions of the registered holders and particulars of the certificates held by them respectively.

" 3. The registered holder or his legal personal representative will be regarded as exclusively entitled to the benefit of this certificate and all persons may act accordingly, and the company shall not be bound to enter in the register notice of any trust or, except as by some Court of competent jurisdiction ordered, to recognise any trust or equity affecting the title to this certificate or to the moneys hereunder payable.

" 7. The moneys hereunder payable will be paid without regard to any equities between the company and the original or any intermediate holder hereof or any set-off or cross-claim, and the receipt of the registered holder for such moneys shall be a good discharge to the company for the same.

" 8. The company may at any time give notice in writing to the registered holder hereof or his legal personal representatives of its intention to pay off the moneys payable hereunder or any part thereof, and upon the expiration of three calendar months from such notice being given the principal moneys payable hereunder then due and unpaid or any part thereof shall become payable.

" 9. The holders of three-fourths in value of the certificates of this series for the time being outstanding may, by writing under their hands, sanction any modification of the rights of the certificate holders of this series which shall be proposed by the company, and any compromise or arrangement proposed to be made between the company and the holders of the certificates of this series, including any postponement

of the time for payment of any moneys due hereunder and any modification, compromise or arrangement so sanctioned, shall be binding on all the holders of certificates of this series, and notice thereof shall be given to them accordingly, and each holder shall be bound thereupon to produce his certificate to the company and to permit a note of such modification or compromise to be placed thereon."

In June, 1925, the plaintiffs gave notice to the company of their desire and intention to inspect the register of income stock certificate holders kept by the company in accordance with the aforesaid conditions and, in consequence of the company's refusal to allow them inspection, the plaintiffs issued a writ by which they claimed: (1.) a declaration that the income stock certificates issued by the company for securing the issue of 1,400,000*l.* were debentures within the meaning of s. 102 of the Companies (Consolidation) Act, 1908; (2.) an injunction to restrain the company from interfering with the plaintiffs in the exercise of their statutory rights, as registered holders of income stock issued by the company, to inspect the register of holders of income stock kept by the company; and (3.) a mandamus commanding the company to supply the plaintiffs with a copy of the register; and on June 30, 1925, the plaintiffs moved for an interim injunction in the terms of the writ and for an order on the defendant company to furnish the plaintiffs with a copy of the register.

Jenkins K.C., *Sir Patrick Hastings K.C.*, *Jolly* and *G. Ansley* for the applicants. This certificate is a debenture within the meaning of s. 102 of the Companies (Consolidation) Act, 1908. It contains a clear acknowledgment by the company of its indebtedness to the plaintiffs in the sum of 2100*l.* It falls within the definition of a debenture given by Chitty J. in *Levy* v. *Abercorris Slate and Slab Co.* (1), which was that "any document which either creates a debt or acknowledges it is a debenture." The mere statement in the certificate of the company's indebtedness is enough to constitute it a debenture. A "debentur" is referred to in Blount's Law Dictionary as

(1) (1887) 37 Ch. D. 260, 264.

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having been ordained by a Rump Act in 1649, to be in the nature of a bond or bill to charge the Commonwealth to pay the souldier-creditor the sum due upon auditing the account of his arrears. Further, the certificate contains a charge on assets of the company: the debt is made payable out of profits and is therefore an equitable charge on profits. The certificate bears many of the characteristics of a common debenture: it is one of a series and the rights of the certificate holders cannot be regarded separately, the company is bound to apply the profits pari passu. No certificate holder is entitled to preference over another: if profits were made and the company improperly refused to divide them, any holder might bring an action, but it would have to be a representative action on behalf of himself and the other holders and he might have a receiver appointed of the profits, because he would have a right in the property of the company, that is, a charge on it which required to be protected. As in *Gardner* v. *London, Chatham and Dover Ry. Co.* (1) the certificate holders here are entitled to a charge on the fruit of the tree.

Owen Thompson K.C. and *A. Sims* for the respondents. It is doubtful whether North J. would have agreed with Chitty J.'s definition of a debenture in the case cited: *Topham* v. *Greenside Glazed Fire Brick Co.* (2) At the present day a document which either merely created or acknowledged a debt would not be styled a debenture, for in that case a debenture would include a promissory note, a bill of exchange and an I.O.U. Etymologically the term might perhaps be applied to such instruments as those; but the question really depends upon what is the conventional, commercial or popular sense in which the word is used at the present day. What would it connote to the lawyer or man of business? Lindley J. in *British India Steam Navigation Co.* v. *Inland Revenue Commissioners* (3) said that he did not know what a debenture was; he did not find anywhere any precise definition of one. Roughly speaking a debenture is an instrument under the seal of a company, providing for the payment of a principal

(1) (1867) L. R. 2 Ch. 201. (2) (1887) 37 Ch. D. 281.
(3) (1881) 7 Q. B. D. 165, 172.

sum and interest at a specified rate and being one of a series of like debentures ranking pari passu and carrying a charge or secured on the company's undertaking: Palmer's Company Precedents, 12th ed., Part 3, pp. 2, 3. It is sufficient to say that whatever this certificate is, it is not a debenture within the meaning of s. 102: Buckley on Companies, 10th ed., p. 232. The term is a flexible one; some of the more salient characteristics of a debenture are the following: it is as a rule one of a series, but a single debenture is not uncommon; it is generally issued by companies, but sometimes by clubs and even by individuals; it is usually, when issued by a company, under the seal of the company, but not always: *British India Steam Navigation Co.* v. *Inland Revenue Commissioners* (1); *In re Fireproof Doors, Ld.* (2) It generally provides for payment of a specific principal sum at a specified date, but there are many permanent debentures payable on a contingency, e.g., in the event of a winding up: it usually provides for payment of interest at a specified rate: generally the interest is payable unconditionally, but sometimes it is payable only out of profits or subject to conditions: it generally contains a charge on the undertaking of the company or on some part of its property, but the term does not necessarily imply (like the term "mortgage debenture") a security, and debentures have been issued, especially in Scotland, without any such charge: *Edgington* v. *Fitzmaurice* (3) and *British India Steam Navigation Co.* v. *Inland Revenue Commissioners.* (1) Generally, the term is not applied to an instrument, unless it purports to be a debenture, but this rule is sometimes disregarded: *Gardner* v. *London, Chatham and Dover Ry. Co.* (4), and a debenture is constantly secured by a trust deed. It is easier to determine whether a particular instrument is or is not a debenture than it is to define one in the abstract; it has been held that an instrument not purporting to be a debenture may be one within s. 17 of the Bills of Sale Act, 1882. In the Companies Act, 1862, the term never once appears, whilst in the Act of 1908, the term is frequently

(1) 7 Q. B. D. 165.
(2) [1916] 2 Ch. 142.
(3) (1885) 29 Ch. D. 459.
(4) L. R. 2 Ch. 201.

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used, showing the advance in the importance of debentures in the interval. It is obligatory on a company to keep a register of mortgages and charges under s. 100 of the Companies Act, 1908; and an instrument mortgaging or charging property of a company has to be placed on the register under s. 93. But there is no obligation imposed by statute on a company to keep a register of debentures, that is voluntary. If this document is held to be a debenture merely because it contains an acknowledgment of a debt, there will be cast upon the company the onerous duty of having to register every promissory note and bill of exchange and of allowing inspection of the register to any one who happens to hold a note or bill of the company. There are absent from the present certificate so many of the indicia to be found in an ordinary well-known debenture that it falls short of being a debenture. First, it does not purport to be a debenture, it is called an income stock certificate; secondly, it is not under the seal of the company; thirdly, it is payable only out of profits and does not charge or purport to charge the undertaking or assets of the company; and fourthly, there is no acknowledgment of indebtedness simpliciter, within the meaning of Chitty J.'s definition in the case cited. There is only an acknowledgment subject to the condition that there are profits earned. The agreement that the debt should be payable out of three-fourths of the profits does not create any charge on the profits; its effect is only to entitle a certificate holder to be paid out of those profits to the exclusion of any other persons, and the agreement that the stock should be paid off pari passu is only in effect an earmarking of the profits in favour of the holders, but does not create a charge upon them. There is no charge on the undertaking or any assets of the company; the certificate holder has a right to have a receiver appointed of the profits, only if and when there are profits. There may be a charge on a dividend which is distributable as such and profits are earmarked as and when they come into existence, but there is nothing comparable with the charging of a particular part of the capital assets of the company.

LAWRENCE J. I am clearly of opinion that these so-called income stock certificates are debentures within the meaning of s. 102 of the Companies (Consolidation) Act, 1908, and that the register kept by the company at its office in pursuance of cl. 2 of the conditions indorsed on those certificates is a register of debenture holders also within the meaning of that section.

The company being desirous of raising money for the benefit of its undertaking determined upon an issue of 1,400,000*l.* "income stock" payable out of profits and issued to persons subscribing to that stock documents called "income stock certificates." In the first clause of each certificate the company acknowledges that it is indebted to the registered holder in the sum therein mentioned—in the certificate issued to the plaintiffs the sum is 2100*l.*—"payable only out of profits as hereinafter mentioned." [His Lordship then read the remaining clauses of the certificates and the conditions stated above and continued:] The main features which, in my opinion, tend conclusively to show that these certificates are debentures are the acknowledgment of the debt, the charge, the fact that they form a series ranking pari passu, and the fact that they are issued subject to conditions bearing a marked resemblance to the conditions commonly found in debentures, including a power given to three-fourths in value of the holders to modify the rights conferred on the holders. It would be strange, in the circumstances, if the company, although binding itself to keep a register of the certificates, were to have power to refuse inspection of such register by the registered holders of the certificates. Such a refusal would practically deprive the certificate holders of the benefit of the conditions and might work a serious injustice. If, for instance, a proposal were made by the company to modify or vary the rights of the certificate holders, the first thing that any holders who were opposed to such a proposal would want to know would be who their co-holders were, so that they might approach them with a view to inducing them to join in resisting any such modification or variation.

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Various reasons have been advanced on behalf of the company, however, in opposition to the contention that these certificates are debentures. The first is, that the certificates do not on the face of them purport to be debentures, but, on the contrary, that they refer prominently to the "authorised debenture issue" of 240,000*l.*, thereby showing that the company considered the issue of income stock certificates not to be an issue of debentures. In my opinion, it is wholly immaterial whether the company thought that the certificates were not debentures if in fact they were. It may be that the certificates constitute a class of debentures having characteristics entirely different to those of the class which are designated as "authorised" debentures, but neither this fact nor the fact that the certificates are not styled "debentures" by the company can have the effect of preventing the certificates from being debentures, if in fact they are debentures. Further, it is pointed out that the certificates are not issued under the seal of the company. Although it is true to say that debentures are usually issued under the seal of the company, it is not seriously contended that a debenture must necessarily be a document under seal. Another argument addressed to me was that the certificates do not purport to charge any assets of the company, but only purport to ear-mark profits, if and when they arise, as the fund out of which the amount mentioned in the certificate will be discharged. Even if the certificates had contained no charge, I think they would, nevertheless, have been debentures, as a charge, although usual, is not an essential requisite of a debenture. In the present case, however, there is, in my opinion, a charge upon the profits of the company, as and when such profits arise; and it seems to me immaterial to go into the question of the value of the charge. The charge is upon three-fourths of the profits of the company; and, as such profits result from the trading of the company and belong to the company, until distributed, they clearly constitute assets of the company. It is further contended that there is no acknowledgment of a debt simpliciter, so as to bring the certificates within the definition of debentures given by

Chitty J. in *Levy* v. *Abercorris Slate and Slab Co.* (1) In my opinion this contention is unsound, because there is a definite acknowledgment of indebtedness although such indebtedness does not fall to be discharged, unless or until profits are earned or notice to pay off is given by the company. Mr. Owen Thompson has practically admitted that none of the objections which he has raised, if taken singly, is sufficient to prevent the certificates from being debentures, but that the absence of all the indicia to which he has referred shows that they are not, in fact, debentures. In dealing with that argument, I think it is most important to consider, on the other hand, the features to which I have referred and which are commonly found in ordinary debentures; the presence of those features, in my opinion, far outweigh the absence of the other indicia to which reference has been made by counsel for the company.

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In the result, I hold that the register of these certificates is open to the inspection of every certificate holder; and, accordingly, I propose to grant the injunction claimed.

H. C. H.

The respondent company appealed. The appeal was heard on July 13 and 14, 1925. C. A.

Upjohn K.C., *Owen Thompson K.C.* and *A. Sims* for the appellant company repeated in substance the arguments adduced by them in the Court below, and referred to the following additional authorities: *Edmonds* v. *Blaina Furnaces Co.* (2); *Famatina Development Corporation* v. *Bury* (3); Palmer's Company Precedents, 12th ed., Part 3, p. 297, Form 58A.

Sir Patrick Hastings K.C., *Jolly* and *G. Ansley* for the respondents were not called upon to argue.

POLLOCK M.R. This appeal must be dismissed. The point arising for our decision is whether or not this document

(1) 37 Ch. D. 260, 264.
(2) (1887) 36 Ch. D. 215, 218.
(3) [1910] A. C. 439; [1909] 1 Ch. 754.

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is a debenture within the meaning of s. 102 of the Companies (Consolidation) Act, 1908. That section by sub-s. 1 provides that "Every register of holders of debentures of a company shall, except when closed in accordance with the articles during such period or periods (not exceeding in the whole thirty days in any year) as may be specified in the articles, be open to the inspection of the registered holder of any such debentures." The action has been brought by two holders of a so-called debenture to have it determined that they are entitled, pursuant to that section, to have an inspection of the register of holders of these documents.

Mr. Upjohn, very early in his argument, pointed out that the Court has not to come to a conclusion by way of definition as to what a debenture is. What it has to determine in this case is whether or not the document which has been issued to the plaintiffs is to be deemed a debenture within the meaning of s. 102. Our attention has been called to what is a matter of interest, that this word "debenture" is one very old in use in the English language. Some account of it is to be found in the opening words of the first chapter of Part 3 of Sir Francis Palmer's Company Precedents (12th ed.). Again, Chitty J., in *Levy* v. *Abercorris Slate and Slab Co.* (1), mentioned the fact that he had had his attention called to the old uses of the word "debenture." Sir Francis Palmer in his book has collected a number of characteristics, some of which are to be found in various debentures. They are tabled on pp. 3 and 4 of the volume to which I have already referred, and some nine characteristics are pointed out as not uncommon in some debentures. But it is not essential that these characteristics should all be present, and some indeed are almost the antithesis the one of the other. For instance, sometimes you have a number of debentures issued as a series with a register of the series; on the other hand, you sometimes have a debenture which is issued to one person only, a single debenture. That single debenture is perhaps less common

(1) 37 Ch. D. 260, 263

in the present day than it was formerly. At any rate, there are a number of characteristics which I think are summarized in the passage to which I have referred; but whatever the characteristics which you would expect to find or may find in the debentures, the root meaning of the word is "indebtedness"; that it does record an indebtedness.

Now, the present document is one which relates to an issue of 1,400,000*l.* of income stock, payable out of profits, and the document in question is named an income stock certificate. On its face it bears a number which shows that it is one of a series, and on the back of it, among the conditions which are stated to be deemed part of it, the condition is recorded that the certificate is one of a series of like certificates, and that a register of the certificates will be kept at the company's registered office, wherein will be entered the names and addresses and descriptions of the registered holders and particulars of the certificates held by them respectively. But on the primary point that is essential, it records indebtedness in these words: "This is to certify that the above named company is indebted to Messrs. Brighten and Lemon . . . . or other registered holder for the time being of this certificate, in the sum of 2100*l.*, payable only out of profits as hereinafter mentioned."

Now, Lindley J., in *British India Steam Navigation Co.* v. *Inland Revenue Commissioners* (1), states that he does not know of any satisfactory legal definition which has been given of a debenture, and that the fact that the particular document is called a debenture is something to which possibly some attention should be given, but that it is not essential. The actual decision in that case was that a document which, on the face of it, was called a debenture and recorded indebtedness and was one of a series, was to be dealt with as a debenture under the Stamp Acts. But he says (2): "Now, what the correct meaning of 'debenture' is I do not know. I do not find anywhere any precise definition of it. We know that there are various kinds of instruments commonly called debentures. You may have mortgage debentures,

(1) 7 Q. B. D. 165, 172. (2) Ibid. 172.

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which are charges of some kind on property. You may have debentures which are bonds; and, if this instrument were under seal, it would be a debenture of that kind. You may have a debenture which is nothing more than an acknowledgment of indebtedness." That Lindley J. is right in what he says appears to me to be established by the passages which are to be found in Sir Francis Palmer's book and in the decisions which have been given in respect of particular documents. I do not refer again to the cases which were cited before Chitty J., but in *Edmonds* v. *Blaina Furnaces Co.* (1) he says: "In determining what is or is not a debenture within the section I am not bound to hold that an instrument is a debenture because it is called a debenture by the company issuing it, nor to hold it is not a debenture because it is not so called by the company. I must look at the substance of the instrument itself, and, without the assistance of any precise legal definition, form the best opinion I can whether the instrument does or does not fall within the exemption of the section." Taking those two passages from Lindley J. and Chitty J., I look at this document, which, as I have already stated, is a certificate of indebtedness of the company to the plaintiffs, who are described as the registered holders for the time being of the certificate, and I find it also provides for the keeping of a register and also for transfers which are to be made from one holder to another, and the registration of the transfers when they have been completed. It is true that by cl. 2 of the terms on the face of the certificate it is provided that the source from which the payment is to be made of this indebtedness is only out of three-fourth parts of the annual net profits of the company as and when those profits have been made and have been certified to exist by the auditors, whose certificate is to be final. Mr. Upjohn says the fact that you have an acknowledgment of indebtedness may be an indication that the document is a debenture, but that when you have the source of payment narrowed down to three-fourths of the actual net profits, which never may be made, and no other

(1) 36 Ch. D. 215, 220.

source indicated, you have not got a debenture, because in ordinary parlance you would expect to find some charge upon the assets of the company or some method of payment less narrow than that which is indicated in this certificate. I do not accept that view, because it appears to me from what I have already said that the primary qualification of a debenture is fulfilled—namely, that it is an acknowledgment of indebtedness, and the fact that the possibility of payment is limited to three-fourths of the net profits may make the expectation of repayment less than it would otherwise be, but it does not prevent the fact of there being a source from which this recorded indebtedness may be resolved.

Now, Sir Francis Palmer in his catalogue of the characteristics of a debenture says: "A debenture is, as a general rule, one of a series." This document is certainly one of a series. The term "debenture" is applied, as a general rule, to instruments issued by a company. This instrument is issued by a company. It is not issued, it is true, under seal. A debenture usually provides for the payment of a specific principal sum at a specified date, but that, as he points out in the paragraph, is not essential, for there are millions of debentures which have not an actual provision for repayment because they are perpetual or permanent debentures. A debenture usually provides for payment of interest. This document does not, and a debenture generally contains a charge on the undertaking of the company; but from the cases that are referred to it is quite plain that there are a number of debentures in which there is no such charge; and indeed one must be careful not to confuse a debenture with a mortgage debenture.

But coming back again to s. 102 of the Companies Act, I think it was thereby intended to give to the persons whose names are recorded in the register of debentures an opportunity of obtaining the information that they need, and that on the whole the word "debenture" is intended to be used without a precise or narrow meaning. In the present case I think that clauses 1 and 2 on the face of this stock certificate clearly indicate an instrument which in its true

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nature is a debenture. I may leave out of consideration clauses 3 and 4, because they deal only with the mode of repayment which is to be made out of the profits, but the last clause is: "This certificate is issued subject to and with the benefit of the conditions endorsed hereon, which are to be deemed part of it." Those conditions, as I have already pointed out, refer to the register, to the transfers, and to a number of other matters which are certainly, not to put it too high, not uncommonly given in the case of registered debentures of a company. I agree with Mr. Owen Thompson that what you find in condition 8 does not make that a debenture which is otherwise not a debenture; and I do not think it is necessary for us to determine whether or not in the case of a liquidation there would be a right on the part of the holders of these stock certificates to repayment as a debt in the liquidation. But it appears to me that the very intention of this instrument is to record indebtedness, to record the source from which that indebtedness is to be liquidated, and to show that the persons who are holders of the certificates are holders in a series and are to be paid pari passu, and that their names are to be recorded in a register. This instrument does, therefore, contain a number of characteristics of a debenture, and in my judgment we ought to hold affirmatively that it is a debenture within the meaning of s. 102.

The appeal fails and must be dismissed with costs.

WARRINGTON L.J. I am of the same opinion. This company has issued certain documents which it calls income stock certificates, each one of which purports to be one of a series of like certificates for an amount not exceeding in the aggregate at any one time 1,400,000*l*. The company binds itself by the conditions on the back of the certificate to keep a register of the certificates at the company's registered office wherein would be entered the names and addresses and descriptions of the registered holders and the number of certificates held by them respectively. The plaintiffs are the holders of one of these certificates for a

sum of 2100*l*. They have applied to the company for the inspection of the register which the company thus binds itself to keep, and that inspection has been refused on the ground that the document is not a debenture within the meaning of s. 102 of the Companies (Consolidation) Act, 1908, and the question is whether this document is or is not such a debenture. The learned judge has decided that it is, and I agree with him.

Now, it has been said by a wiser man than myself that it is impossible to give an exhaustive definition of the word "debenture"; and I certainly do not propose to incur the reproach of venturing where wise men fear to tread, and therefore I shall not attempt to give any definition of the word "debenture." But there are certain characteristics which, if found in a document, have usually in legal and commercial transactions been held to constitute that document a debenture. One of those is that the document is an acknowledgment of indebtedness, and I look to this document to see whether it does or does not contain at least that characteristic. I find that it does. It certifies that the company "is indebted to" the plaintiffs "or other registered holder for the time being of this certificate in the sum of 2100*l*." That is a clear acknowledgment of the indebtedness of the company in that sum. It is quite true that the document contains special provisions with regard to the funds out of which that indebtedness will be satisfied by payment; but that, in my opinion, is irrelevant to the question that we have to determine. If you find that a document of this kind contains an acknowledgment of indebtedness, it satisfies, at all events, that part which was thought to be sufficient by Chitty J. and was said in express terms to be sufficient by Lindley J., and I need not express my own opinion. On these authorities it is obviously sufficient to constitute the document a debenture, and on that simple ground, in my opinion, the judgment of Lawrence J. was correct.

It is unnecessary to decide, and I do not propose to express an opinion on, the other questions which have been

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raised in the course of the argument. One of those was whether this is a debt which in the case of a winding up would have to be paid, although there were no profits out of which it was payable. That may provide a difficult and interesting question if and when it arises, but it has not arisen, and I therefore express no opinion upon it, nor do I express any opinion on the true construction and effect of cl. 8 of the conditions, which enables the company to give notice of its intention to pay off what remains owing at the expiration of the notice to pay. That, again, gives rise to interesting questions of law. But for the purpose of this decision it is enough, in my opinion, to say, as I do, that this document contains an acknowledgment of indebtedness and therefore ranks as a debenture within the meaning of s. 102 of the Companies (Consolidation) Act, 1908. I agree that the appeal fails and must be dismissed with costs.

SARGANT L.J. I am of the same opinion. The point is a short one, and I will add very little to what has been already stated. It is true that this document is not called, on the face of it, a debenture. But I should like to make this observation, that not only is the name not conclusive, but that while I think it would be difficult for a company to put on the face of these documents a statement that it was a debenture and then to say that it was not a debenture, I do not think there is the same difficulty in holding that something which is not called a debenture by the company is a debenture, inasmuch as there are certain obvious reasons, financial and other, which might induce a company not to attach the name "debenture" to it. I should like also to add this, that what this is called by the company, an income stock certificate, has no meaning at all in law so far as I can see. This is a limited company. A limited company may have share capital and may have debenture capital or loan capital. Share capital may be converted into stock, and then the company issues stock certificates in the place of share certificates. But this is certainly not a stock certificate; there are no shares which have been converted into

stock. The name given, income stock certificate, is, on the face of it, technically meaningless, and therefore it seems to me that no importance is to be attached to the particular designation adopted by the company, inasmuch as that particular designation is one that has no technical meaning at all.

In this case, is this document, in the first place, an acknowledgment of indebtedness, because I think such an acknowledgment is the first and principal characteristic of a debenture? Mr. Upjohn has strenuously contended that it is not, because, as he says, the acknowledgment in the document is coupled with a restriction to payment out of profits, which prevents it being an acknowledgment of indebtedness. But surely that is altogether to give the go-by to the common doctrine that you may have a debt which is debitum in præsenti solvendum in futuro, and which may not only be payable in the future but may be payable on a contingency. Here the language of the document is to my mind absolutely clear and specific. The certificate begins by saying "This is to certify that the above-named company is indebted to" certain persons "or to the other the holders" and then follow the words "payable only out of profits as hereinafter mentioned." I should find it difficult to frame clearer words for the purpose of expressing that there is an immediate debt, but that that debt is only to be payable in the future and on a contingency; and there are indications to the same effect in the conditions indorsed on the document itself, because in condition 8 there is power in the company at any time to give notice in writing of its intention to pay off the moneys payable thereunder or any part thereof, and upon the expiration of three calendar months from such notice being given the principal moneys payable thereunder then due or unpaid or any part thereof shall be payable. The company is dealing with these moneys as moneys which are presently due, although the payment of them is postponed.

Then there is a question which it is not necessary for us to decide, whether the moneys would be payable in a winding up. Mr. Upjohn thought it essential to his argument to contend,

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as I understood it, that the moneys would not be payable in a winding up, inasmuch as they were only payable out of profits, and profits necessarily cease on the making of a winding-up order. But in my judgment the other construction is at least equally attractive even as a matter of language—namely, that there is a present debt, and that while a company is a going concern that debt is only to be paid out of profits. Certainly, for myself I should find it a very difficult construction to adopt to say that the company immediately after having received 2100*l.*, which I understand was paid for this certificate, could by passing a resolution to wind up absolutely and entirely deprive the holders of this document of any right whatever to receive any payment in respect of it. Beyond that acknowledgment of indebtedness in those clear terms, which is it seems to me the principal matter to look at, there is no doubt that this document does contain conditions which are the ordinary indicia of a debenture. I do not think that anybody, not looking at what the document is called on the face of it but simply having regard to the real effect of it, could have much doubt that this is a debenture of a limited company. Otherwise what is it? As I have said, it is nothing known to the law, unless it is a debenture; it is certainly not a promissory note; it is certainly not a stock certificate. I think the only category into which it can be placed, having regard to ordinary considerations, is the category of a debenture. I must say for myself I am startled at the contents of the document, because it is such an odd document from the commercial point of view. Here you have the acknowledgment of a debt and an arrangement under which that debt is payable over a great number of years perhaps, without any interest payable in the meantime at all. It was a document which was not known to Sir Francis Palmer in the earlier editions of his work, and seems first to have been given as a precedent in the ninth edition. I suppose, as you find it in the ninth edition, and as it is repeated in subsequent editions, it is a document of some commercial meaning and value, but for my part it seems quite unusual in its result.

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However that may be, here we do find on the face of it that which acknowledges a debt. I think I should say there are these further indicia of its being a debenture, that it does, in my judgment, contain a charge on property even if it is only a charge on the profits of the company to arise while the company is going on. The profits of the company until they have been declared and distributed as dividends are, of course, part of the property of the company, and this, in my opinion, is obviously a document which entitled the holder to an enforceable charge on a fractional proportion of the profits of the company as and when those profits shall be ascertained. I think the learned judge was quite right in his decision, and the appeal should be dismissed.

Appeal dismissed.

Solicitors for appellants: *J. D. Langton & Passmore.*
Solicitors for respondents: *Brighten & Lemon.*

W. I. C.

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[584 of 1924.]

Bankruptcy—Receiving Order—After Acquired Property—Power of Official Receiver to manage Debtor's Estate—Powers of Assistant Official Receiver—Sanction to Bankrupt's proceeding with Boxing Contest and receiving Takings—Sanction by Official Receiver binding on subsequently appointed Trustee—Right of Trustee to recover Takings paid to Bankrupt—Liability of Trustee claiming Benefit of Bankrupt's Contract to accept the Burden—Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59), *ss.* 37, 38, 45, 46, 47, 53, 74—*Bankruptcy Rules*, 1915, *r.* 316.

The bankrupt, a promoter of boxing competitions, had in view at the commencement of his bankruptcy a certain boxing contest which he was minded to hold at the Wembley Stadium. On June 26, 1924, a receiving order was made, and on September 6, 1924, he was adjudicated bankrupt. In the meantime, as the result of a proposal made by the bankrupt at an interview with A., the assistant official receiver, on or about July 2, 1924, an

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arrangement was come to (as the Court after hearing the witnesses found at the trial) that the bankrupt should be allowed, notwithstanding the receiving order, to proceed with the contest then in preparation, without interference; and A. gave his sanction to the bankrupt receiving the proceeds of sale of tickets to be issued for the contest and defraying thereout the expenses, upon the bankrupt's undertaking to account for and pay to the official receiver the surplus proceeds. The bankrupt had some time previously to that arrangement and with a view to making it, obtained a stay of the advertisement of the receiving order pending an appeal; but, the appeal having been dismissed, the stay was removed, and on July 29, 1924, the receiving order was gazetted. In pursuance of the arrangement the bankrupt then placed the tickets to view the boxing contest, which was held at Wembley on August 9, 1924, with the respondents K., P. & Co. and other theatre ticket agents for sale to the public; and those agents, after selling the same, paid the proceeds (less their commission) to the bankrupt, who defrayed thereout the expenses of the contest and eventually paid a surplus to the applicant who, in the meantime, namely, on September 9, 1924, had been appointed trustee in the bankruptcy.

Upon motions by the trustee against the agents to recover from them the sums so paid by them respectively to the bankrupt:—

Held, first, that the assistant official receiver (who by r. 316 of the Bankruptcy Rules, 1915, represented the official receiver in all administrative and other matters relating to the affairs of the bankrupt) in giving his sanction to the bankrupt holding the boxing contest and receiving the takings, was acting within his powers as receiver and manager and as the Court would have approved. Secondly, that the trustee was bound by the sanction so given, and was not entitled to recover the sums of money which he claimed from the respective agents. Thirdly, that, even assuming a trustee is not bound by the acts of the official receiver and even if the latter exceeded his powers, it would, in the circumstances, be unjust and inequitable, if the Court were to permit the trustee to repudiate the action of the official receiver by declining to give effect to the sanction given by the latter to the user by the bankrupt for the purposes of the contest of those moneys which, but for such sanction, would never have been payable to him, and at the same time recover those moneys from the agents over again as assets for the creditors.

Quaere, whether, having regard to the facts, it was necessary to consider the applicability of the rule of *Ex parte James* (1874) L. R. 9 Ch. 609.

Ex parte Whittaker (1875) L. R. 10 Ch. 446 and *In re Clark* [1894] 2 Q. B. 393 distinguished.

MOTIONS by the trustee in the bankruptcy of Major James Arnold Wilson against Keith, Prowse & Co., Ld., the District Messenger and Theatre Ticket Company, Ld., Webster & Waddington, Ld., Webster & Girling, Ld., and E. Cherry & Co., theatre ticket agents, and against Fleetway Press, Ld., and the British Empire Exhibition (1924) Incorporated (hereinafter

called "the Wembley authorities") to recover from the first five named respondents certain sums of money representing the proceeds of sale of tickets to view two boxing contests organized and held by the bankrupt at the Albert Hall and at Wembley without (as the applicant alleged) the consent of the trustee in bankruptcy, such proceeds having been paid to the bankrupt after the date of the receiving order; and, further, to recover from Fleetway Press a sum of 2886*l.* also alleged to have been paid by the bankrupt, after the receiving order, to that respondent in repayment of a loan to enable the bankrupt to pay one of the boxers at the Wembley contest; and also to recover from the Wembley authorities moneys collected and received by them for the contest in the Stadium and which they claimed a right to retain, under an agreement with the bankrupt, as security for a sum of money claimed to be owing to them by the bankrupt for the use of the Stadium.

The facts, taken in the main from the judgment of the Court, are as follows:—

On June 26, 1924, a receiving order was made against Major Wilson on a creditor's petition presented on May 25, 1924. The act of bankruptcy on which the petition was founded occurred on May 1, 1924, and consisted of the failure of Major Wilson to comply with a bankruptcy notice which was served upon him on April 23, 1924.

Major Wilson, who was a promoter of boxing competitions, had, at the time when he got into the financial difficulties which led to his bankruptcy, for some time been engaged in what he called "creating a situation favourable to the staging of boxing competitions." A match between Lewis and Brown was to be the chief attraction at the Albert Hall, and a match between Bloomfield and Carpentier or Gibbons was to be the chief attraction at the Stadium at Wembley. Major Wilson was sanguine that if the contests were allowed to proceed they would result in his realizing a sufficient sum to enable him to tide over his financial difficulties. He had practically no assets, and the publication of the bankruptcy proceedings would effectually put a stop to the contests and

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to any chance of getting any money for his creditors. He, therefore, applied for a stay of the advertisement of the receiving order pending an appeal to the Court of Appeal. The Registrar, before granting a stay of the advertisement, was informed of the two contemplated contests and of Major Wilson's hope that the resulting profits would meet his liabilities.

On or about July 2, 1924, Major Wilson, in company with his solicitor, Mr. Barton, had an interview with Mr. Armstrong, the assistant official receiver in bankruptcy, and thereat Mr. Armstrong was informed by those two of the contemplated contests at the Albert Hall and Wembley and of the desire of Major Wilson that, notwithstanding the receiving order, he should be allowed to stage those contests, as the only hope of providing assets to meet the claims of his creditors, and Mr. Armstrong then realized that, in order to enable Major Wilson to proceed with the contests, it was essential that he should be allowed to receive the proceeds of sale of tickets and to apply such proceeds in paying the expenses of the contests, and that the official receiver should not attempt to intercept such proceeds as interim receiver and manager of Major Wilson's estate; and it was then arranged between the parties at that interview that the Albert Hall contest (which had been fixed for July 3) and the Wembley contest should go on without any interference on the part of the official receiver upon Major Wilson undertaking that he would not use the proceeds of sale of tickets for his private purposes, but would only use them for discharging the expenses of the contests.

The Albert Hall contest took place on July 3, 1924, and the proceeds of the sales of the tickets therefor (all of which, except a sum of 32*l.* 19*s.* paid on July 14, 1924, by the respondents, Keith, Prowse & Co., without knowledge or notice of the bankruptcy proceedings, had been paid to Major Wilson before the receiving order) were applied by Major Wilson towards defraying the expenses of the contests without any interference on the part of the official receiver. To the proceeds of sale of tickets for that contest, with the exception

of the said sum of 32*l.* 19*s.* paid after the date of the receiving order, the trustee made no claim.

After that contest, Major Wilson devoted his energies to make a success of the forthcoming contest at Wembley; and, being unable to come to terms with Carpentier, he arranged that Gibbons (who arrived in England from America on July 15) should meet Bloomfield at the Stadium at Wembley on August 9. The contracts with those boxers were not put in evidence, but it appeared that Gibbons' share of the purse was agreed at 11,000*l.* and Bloomfield's at 8000*l.*

On July 25, 1924, the Court of Appeal dismissed Major Wilson's appeal against the receiving order, and thereupon the stay of the advertisement was removed, and on July 29, 1924, the receiving order was gazetted. In the meantime Major Wilson had been proceeding with his arrangements for the Wembley contest. He advertised the contest extensively, sold numerous tickets to the respondents for resale to the public, and negotiated an agreement with the Wembley authorities for the use of the Stadium and for the sale of programmes. On July 29, 1924, the agreement between the Wembley authorities and Major Wilson was signed, one of the terms being, that the Wembley authorities should collect all moneys taken at the turnstiles and should hold such moneys as security for the sum payable by Major Wilson for the use of the Stadium.

On July 31, 1924, it came to the knowledge of the Wembley authorities that the receiving order had been made, and thereupon they consulted their solicitors, Messrs. Slaughter & May, who instructed their managing clerk, Mr. Scott, to see the official receiver. Mr. Scott accordingly had an interview with Mr. Armstrong on August 1, 1924. At that interview Mr. Scott explained the position to Mr. Armstrong and showed him the agreement of July 29, 1924, and Mr. Armstrong fully realized that the proceeds of sale of the tickets were the only source from which Major Wilson could provide for the expenses of the contests, that unless he received those proceeds and applied them in paying the expenses and unless the

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charge which he had given to the Wembley authorities was valid, no contest could take place. It was proved that, although Mr. Armstrong stated that no trustee had been appointed and that Mr. Scott would have to take the risk of advising his clients as to the course they should adopt, he gave Mr. Scott distinctly to understand that the official receiver in the circumstances would not interfere by intercepting the proceeds of the sales of the tickets, as Major Wilson, whom he trusted, had promised that he would not use them for his private purposes, but would apply them exclusively in paying the expenses of the contest. As the result of that interview the Wembley authorities proceeded to act on their agreement of July 29, 1924, relying on Mr. Armstrong's assurance that the official receiver would not interfere and that the security given to them by that agreement was an effective security. Major Wilson accordingly issued tickets for the Wembley contest to be held on August 9, 1924, to the theatre ticket agents, in some cases selling them outright at a discount and in others placing them with those agents for sale to the public in consideration of a commission on such sales. The proceeds of the sales, less the discount or commission, were then paid to Major Wilson, who paid the moneys he so received into a special banking account and thereout defrayed the expenses. The sales of tickets took place after the receiving order, some pending and others after the advertisement of the order on July 29, 1924, and the proceeds of the sales were paid to Major Wilson during the months of July and August, before adjudication.

On the day of the Wembley contest Bloomfield at the last moment refused to go into the ring unless he were paid 3000*l.* in cash. Major Wilson had not that sum available, but induced Mr. Masters, the managing director of Fleetway Press, to advance that sum on a promise that it should be forthwith repaid out of the cash takings at the various ticket offices in the exhibition grounds. This arrangement was carried out, and Bloomfield having received from Mr. Masters a cheque for 3000*l.* appeared in the ring, and during the contest 2886*l.* was collected from the various ticket selling places at

the Stadium and handed to Mr. Masters towards repayment of the 3000*l.*

On September 6, 1924, Major Wilson was adjudicated bankrupt, and on September 9 Mr. Salaman was appointed trustee.

On October 30, 1924, in fulfilment of his promise to Mr. Armstrong, Major Wilson rendered to the trustee an account of the proceeds of the sales of the tickets received by him and of the expenses paid thereout, and gave the trustee a cheque for the balance of 735*l.* 10*s.* 4*d.* shown on that account as remaining to his credit at the bank.

On June 9, 1925, the trustee launched these motions claiming (1.) to recover from the various agents all sums paid by them since the receiving order to Major Wilson for the tickets which they had purchased from him or which they had sold on his behalf in connection with either the Albert Hall or the Wembley competitions; (2.) to recover from Fleetway Press, Ld., the 2886*l.* paid to Mr. Masters on August 9, 1924, towards recouping the loan of 3000*l.*; and (3.) to recover the money collected at the turnstiles by the Wembley authorities and by the sale of programmes which they claimed to retain under the terms of their agreement of July 29, 1924, as security for the payment of the sum due to them in respect of the use of the Stadium.

Clayton K.C. and *Harold Simmons* for the applicant. The assistant official receiver never in fact gave his sanction to Major Wilson holding the contests and receiving the proceeds of sale of the tickets; and even assuming he gave it, such sanction was nugatory. It could only be given, if at all, by the official receiver himself. The trustee subsequently appointed was not bound by the sanction given by the official receiver, assuming that the latter had power to grant it. The powers of the official receiver are limited to the interim protection of the property of the bankrupt pending the appointment of a trustee and fall short of authorizing him to sanction the bankrupt carrying out such a hazardous venture as a boxing contest: Bankruptcy Act, 1914, s. 74.

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Upon adjudication the proceeds of the sales of the tickets paid to the bankrupt by the respondents were property of the bankrupt divisible (by the trustee) amongst his creditors: Bankruptcy Act, 1914, s. 38. They were acquired during the bankruptcy, before discharge. But, as they were acquired after the date of the receiving order, they do not fall within the protection afforded by ss. 45 or 46 of the Act, nor were those payments to the bankrupt transactions protected by s. 47, since they took place before adjudication. Therefore, prima facie, the payments were nugatory and the receipt by the bankrupt was no effectual discharge in favour of the respondents; and that, notwithstanding it was owing to the stay by the bankrupt himself of the advertisement of the receiving order that the respondents paid the moneys without notice of that order: *Ex parte Rabbidge.* (1) Upon adjudication those moneys vested in the trustee, and under the doctrine of relation back, the bankruptcy must be deemed to have commenced when the act of bankruptcy was committed: s. 37. Therefore, the moneys in question vested in the trustee at the commencement of the bankruptcy and formed part of the bankrupt's estate, which it was the duty of the trustee to administer on behalf of the creditors. The moneys were not personal earnings of the bankrupt in the sense that he earned them by his own personal skill, in which case, only so much of them would pass to the trustee as was not reasonably required for his maintenance; but they were profits of his trade the whole of which passed to the trustee: *Elliot* v. *Clayton* (2); *In re Dowling* (3); *Emden* v. *Carte* (4); *In re Rogers* (5); *In re Roberts.* (6) The bankrupt's personal earnings are not subject to the doctrine of *Cohen* v. *Mitchell* (7), now stereotyped in s. 47 of the Bankruptcy Act, 1914. The principle that one must not claim the benefit without accepting the burden does not in such a case apply to a trustee in bankruptcy: he is entitled to disclaim onerous property: s. 54.

(1) (1878) 8 Ch. D. 367.
(2) (1851) 16 Q. B. 581.
(3) (1877) 4 Ch. D. 689.
(4) (1881) 17 Ch. D. 768.
(5) [1894] 1 Q. B. 425.
(6) [1900] 1 Q. B. 122.
(7) (1890) 25 Q. B. D. 262.

The moneys were vested in the trustee by force of the statute, which treats after acquired property as having to be dealt with in precisely the same way as property belonging to the bankrupt at the commencement of his bankruptcy; and the trustee is entitled to take the proceeds without paying the costs of producing them: *In re Clark* (1); *In re Whittaker*. (2) There is no estoppel as between the official receiver and the trustee. Estoppel only operates between parties and privies: Co. Litt. 352a; and there is no privity between the official receiver and the trustee, as there is no vesting until adjudication. Moreover, the respondents were not induced to act and did not act upon anything said or done by the official receiver, as, in fact, they did not know that an official receiver of the estate had been constituted. There is no ground for the application of the principle of *Ex parte James*. (3) The trustee here was not privy to the bankrupt carrying on the contests and receiving the proceeds. The trustee was not bound by whatever the official receiver thought fit to arrange. This case is distinguishable from *In re Tyler* (4), where the principle was applied, because the official receiver in that case was the trustee after adjudication and as such knew that the wife had been paying the premiums on the policies which he claimed as the property of the bankrupt without recouping to her the premiums she had paid; and it is distinguishable from *In re Thellusson* (5), because there the trustee sought to retain money which he knew was lent to the bankrupt in ignorance of the receiving order and which would not have been lent had the lender known of it. Here, the trustee is not seeking to increase the assets, but the respondents are seeking to deprive the creditors of what the statute has declared is the property of the bankrupt divisible amongst his creditors. The present case is covered by *In re Wigzell* (6); the trustee is entitled to recover the moneys, because they vested in him as the property of the bankrupt

(1) [1894] 2 Q. B. 393.
(2) L. R. 10 Ch. 446.
(3) L. R. 9 Ch. 609.
(4) [1907] 1 K. B. 865.
(5) [1919] 2 K. B. 735.
(6) [1921] 2 K. B. 835.

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at the commencement of the bankruptcy, and the payment of the expenses out of those moneys by the bankrupt is not protected by any provisions of the Bankruptcy Act, 1914. We also rely upon *Tapster* v. *Ward* (1) and *In re Stokes*. (2)

Archer K.C. and *F. G. Paterson* for Keith, Prowse & Co., and the District Messenger and Theatre Ticket Company. It has been proved by the witnesses that Mr. Armstrong, in the bona fide belief that he was acting within his powers, actually signified his approval of the bankrupt, as the agent of the official receiver, holding the contests which the bankrupt then had in preparation and to his receiving the proceeds of the sales of the tickets provided he did not use them for his own private purposes; at the least the bankrupt left the interview in the belief that he had the official receiver's authority to hold the contests and receive the proceeds, which it was not practicable for the official receiver to do personally. Mr. Armstrong's sanction to the contests being held was the sanction of the official receiver whom he represented: r. 316 of Bankruptcy Rules, 1915. (3) The bankrupt was in fact acting as the agent of the official receiver, who was the trustee for the purposes of the Act: s. 53, sub-s. 1; and was authorized in what he did by s. 74 of the Act, which imposed upon him a statutory duty, pending the appointment of a trustee, to act as interim receiver and manager of the debtor's estate and to incur any expenses requisite for its protection. He had the same duty to manage the property as a receiver appointed by the Court would have. The holding of the contests was such an act of management as the Court would have sanctioned, had application been made to it for that purpose. Even if Mr. Armstrong in giving his

(1) (1909) 101 L. T. 503.

(2) [1919] 2 K. B. 256.

(3) Rule 316 of the Bankruptcy Rules, 1915: "An assistant Official Receiver, appointed by the Board of Trade, shall be an officer of the Court, like the Official Receiver to whom he is assistant, and, subject to the directions of the Board of Trade, he may represent the Official Receiver in all proceedings in Court, or in any administrative or other matter. Judicial notice shall be taken of the appointment of an assistant Official Receiver. . . . ."

approval were misjudging his powers, he would be entitled to the indemnity given by r. 320: *In re Wells & Croft.* (1) The trustee was bound by the previous action of the official receiver: *In re Tyler* (2), where the fact that the premiums had been paid by the wife of the bankrupt had been disclosed by the bankrupt to the deputy of a former official receiver in the course of the bankrupt's examination, and a subsequent official receiver was held to be affected by the knowledge of his predecessor. It is not open to the trustee to impugn the action of the official receiver as an action which the Court would have refused to sanction and at the same time claim the fruits of it. Even if the bankrupt was not justified in drawing the conclusion that he had the authority of the official receiver to proceed with the contests, the trustee cannot approbate and reprobate. He cannot in any event recover the moneys from the respondents without giving credit for the expenses, and we say further that the contest having been allowed to proceed, the trustee must now take matters as he finds them. Lastly, the principle of *Ex parte James* (3) and *In re Tyler* (2) applies in any view of this case which is covered by *In re Thellusson* (4), where the Court declined to allow its own officer to insist upon his legal right when that insistence would produce an unjust or dishonest result. Further, in *Edwards* v. *Glyn* (5) it was held that where moneys had been paid to the bankrupt by bankers under a scheme to enable the bankrupt to tide over his financial difficulties and ward off his bankruptcy and that scheme had failed, it would be inequitable for the Court to allow the trustee to retain the moneys.

Clayton K.C. in reply. *Edwards* v. *Glyn* (5) was the case of a trust. Erle J. said: "But this appears to me to have been a specific advance for a specific purpose, with a promise by the bankrupts, at the time the advance was made, that if the money could not be effectually applied to the purpose intended, 'we will return it to you.'"

(1) (1894) 2 Manson, 41.
(2) [1907] 1 K. B. 865.
(3) L. R. 9 Ch. 609.
(4) [1919] 2 K. B. 735.
(5) (1859) 28 L. J. (Q. B.) 350, 358.

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Archer K.C. and *H. J. Wallington* for Webster & Waddington, Ld., and Webster & Girling, Ld.

Hansell for E. Cherry & Co.

Tindale Davis for Fleetway Press, Ld., and the British Empire Exhibition (1924) Incorporated.

Cur. adv. vult.

July 31. LAWRENCE J. The main facts are common to all the seven motions which have been launched by the trustee in this bankruptcy. [His Lordship then stated the facts and continued as follows:] I am of opinion that, in the special circumstances of this case, the trustee is not entitled to recover from the respondents any of the sums so claimed by him.

It is contended on behalf of the trustee, in the first place, that the official receiver did not sanction the receipt by Major Wilson of any of these sums of money nor the application by him of the money so received in the payment of the expenses of the contests. Mr. Clayton made some point of the fact that by the receiving order Mr. Daniel Williams (one of the official receivers of the Court) was constituted the receiver of Major Wilson's estate and that the sanction, if given at all, was only given by Mr. Armstrong, who was merely an assistant official receiver. Having regard to r. 316 of the Bankruptcy Rules, 1915, I hold that there is no substance in this point.

I have already dealt with the question whether Mr. Armstrong did in fact give his sanction to Major Wilson's receipt and application of the proceeds of sale of tickets for the contest in question, and hold that such sanction was given.

The next point taken by Mr. Clayton was that Mr. Armstrong had no power to give any such sanction, and that, even if he had such power, the trustee is not bound by any act or omission of his. On this part of the case I cannot help expressing my sympathy with Mr. Armstrong. Under s. 74 of the Bankruptcy Act, 1914, the official receiver's duty is to act as receiver and manager of the debtor's estate, and for that purpose he has all the powers of a receiver and manager

appointed by the High Court. Mr. Armstrong was deputed to represent the official receiver so far as Major Wilson's estate was concerned.

When Mr. Armstrong was first made acquainted with Major Wilson's affairs he found that Major Wilson had no tangible assets, but had a genuine hope of acquiring enough money to provide for his creditors by means of the forthcoming boxing competitions, which he honestly believed would be a great success.

The Albert Hall competition was imminent, all arrangements were complete and there was no time to summon any meeting of creditors in order to consult their wishes. In the circumstances I think Mr. Armstrong acted in the best interests of the creditors in allowing the contest to proceed without any interference on his part, which determination involved the application by Major Wilson of the money he had received in payment of the expenses of that competition.

As regards the Stadium contest, however, I think that it would have been more prudent if Mr. Armstrong had consulted the creditors or applied to the Court for advice before stating that he would not interfere with this contest. But after having heard and considered all the facts I am of opinion that he acted in a way which would have commended itself to the Court and which the Court would have sanctioned if the matter had been brought before it.

Unless he had given Major Wilson to believe that he might proceed with his arrangements for the contest without any interference on the part of the official receiver, Major Wilson would have been in honour bound to give up the Stadium competition altogether, and thus all chance of getting any assets for his creditors would have vanished. I fail to see how Mr. Armstrong can be blamed for stating that, so far as the official receiver was concerned, Major Wilson might proceed, so long as he did not apply any money which he might receive, otherwise than for the purposes of the competitions, and so long as he accounted for any surplus to the trustee. If Mr. Armstrong had acted as Mr. Clayton suggested he ought to have done and had stated that the proceeds of sale

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of the tickets must be paid over to the official receiver or to the trustee for the benefit of Major Wilson's creditors, no money would have been forthcoming, as the competition could never have taken place and Major Wilson could not honestly have sold any tickets either to the agents or to the public. In such an event Major Wilson's creditors could not possibly have benefited; whereas, by allowing Major Wilson to act as he did, there was a reasonable chance of considerable benefit accruing to his creditors.

Even if Mr. Armstrong exceeded his powers in allowing Major Wilson to receive the moneys and apply them in paying the expenses of the contest, it is difficult for me to appreciate how the trustee can now claim the moneys without affirming the action of Mr. Armstrong in sanctioning the application of those moneys in payment of the expenses, but for which sanction the moneys would never have become payable. It is quite plain that Major Wilson would never have sold a single ticket, unless he had been assured that he could apply the proceeds in payment of the expenses of staging the contests. Had he had any suspicion that he was not entitled to receive the money and that it could have been claimed over again by the trustee he would have been acting fraudulently and dishonestly towards all the respondents in taking their money.

It has not been suggested that Major Wilson acted otherwise than with the utmost candour as regards the official receiver. He told Mr. Armstrong exactly what he wanted to do in order to endeavour to get some money for his creditors, and sought his leave to receive the money, promising that, after paying thereout the expenses of the competition, he would pay over any profits which he might make for the benefit of his creditors.

I entirely dissent from the view strongly urged by Mr. Clayton that the trustee is not bound by any of the acts of the official receiver, because the trustee's title dates back to the commencement of the bankruptcy. It would indeed be strange, if the trustee could repudiate the action of the official receiver in the course of his receivership and

managership, but, notwithstanding such repudiation, could claim as assets the moneys which had arisen solely owing to such action and at the same time decline to give effect to the sanction given by the official receiver to the user of such moneys by Major Wilson, but for which sanction the moneys would never have been payable to him. If Mr. Clayton is right in his contention, it would logically follow that Major Wilson's bankers are liable for having honoured all the cheques drawn by Major Wilson for the expenses of the contests, and the Wembley authorities are liable for the entertainment tax which they paid out of the money taken at the turnstiles. It would also seem to follow that every member of the public who paid for admission to the Stadium could be made to pay over again to the trustee.

In my opinion, in the circumstances of the present case, even if (contrary to my opinion) it were true as a general proposition that the trustee is not bound by the acts of the official receiver and even if Mr. Armstrong exceeded his powers, the trustee cannot take the benefit of Major Wilson's activities since the date of the receiving order without accepting their burden. The payment to and the receipt by Major Wilson of the sums of money which the trustee now claims were the direct result of the leave obtained by Major Wilson from the official receiver to stage the boxing competitions, and in my opinion it would be inequitable and unjust to make the respondents pay those moneys over again for the benefit of his creditors in the bankruptcy and to hold that the charge given to the Wembley authorities was nugatory.

The cases which Mr. Clayton has cited in support of his contentions are in my opinion distinguishable, and are inapplicable to the facts of the present case.

In *Ex parte Whittaker* (1) a trader in the ordinary course of business bought certain goods on credit without informing the seller that he had committed an act of bankruptcy and that a bankruptcy petition had been presented against him; and it was held that the goods which had been delivered to

(1) L. R. 10 Ch. 446.

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the debtor passed to his trustee in the absence of proof that the debtor did not intend to pay for them. The facts of that case do not in the least resemble the facts here, and no such question as has arisen in the present case was considered by the Court.

In the case of *In re Clark* (1) it was held by the Court of Appeal (reversing the decision of the Divisional Court) that, where a bankrupt had traded and acquired property without the knowledge of the trustee in bankruptcy and was adjudicated bankrupt a second time, the property so acquired must be distributed as assets in the first bankruptcy, notwithstanding that the creditors in the second bankruptcy supplied the goods which helped to create the property which the bankrupt acquired. In that case it was contended that the trustee in taking the property and not paying the debts in the second bankruptcy was approbating and reprobating the acts of the bankrupt, but it was pointed out by A. L. Smith L.J. that this was a fallacy, as the goods, when acquired by the bankrupt, vested in the trustee in the first bankruptcy by virtue of the Bankruptcy Act as soon as they were acquired. The facts of that case are altogether different from the facts here, as in that case the trustee in the first bankruptcy was kept in ignorance of the bankrupt's trading, and nothing had occurred to make it inequitable on his part to assert his title to the property.

In *In re Wigzell* (2), a case much relied upon by Mr. Clayton, a bank was disallowed payments made to a customer against whom a receiving order had been made, although the advertisement had been stayed and the bank was in entire ignorance of the receiving order. The case, however, differs in my opinion from the present, in that the debtor there acted improperly and dishonestly in drawing out the money, whereas here the debtor acted with the sanction of the official receiver.

Mr. Archer, on the other hand, has relied upon what is known as the rule in *Ex parte James* (3), and has cited *Ex parte*

(1) [1894] 2 Q. B. 393. (2) [1921] 2 K. B. 835.
(3) L. R. 9 Ch. 609.

Simmonds (1); *In re Tyler* (2); and *In re Thellusson.* (3) These cases have recently been reviewed by the Court of Appeal in the case of *Scranton's Trustee* v. *Pearse* (4), and I do not propose again to review them on the present occasion. I doubt whether any of those cases have any application to the facts of the present case, as in my opinion the respondents have no need to rely upon the rule in *Ex parte James.* (5) The present case is not one where the trustee finds himself in possession of money which the Court considers that it would be dishonest to retain for the benefit of the creditors, but is one where the trustee is seeking to recover from the respondents money which Major Wilson induced them to pay to him, because he had been assured by the official receiver that he might properly receive it.

For the reasons stated I am of opinion that the motions fail and ought to be dismissed with costs.

The trustee will take his costs and also the costs ordered to be paid to the respondents out of the estate.

Solicitors: *Woolfe & Woolfe; Golding, Hargrove & Golding; Alfred Bright & Sons; Wallington, Fabian & Co.; Joynson-Hicks & Co.; H. H. Wells & Sons; Slaughter & May.*

(1) (1885) 16 Q. B. D. 308.
(2) [1907] 1 K. B. 865.
(3) [1919] 2 K. B. 735.
(4) [1922] 2 Ch. 87.
(5) L. R. 9 Ch. 609.

H. C. H.

C. A.
1925
Oct. 15.

In re SWINBURNE.

SUTTON *v.* FEATHERLEY.

[1924. S. 4463.]

Gift inter vivos—Cheque drawn by deceased Donor—Not honoured on Presentation in Donor's Lifetime—Bank not satisfied with Signature—Death of Donor—Incomplete Gift.

A. drew a cheque for 700*l.* in favour of B. and gave it to B., who presented it forthwith. A. had current and deposit accounts at the bank, but her money on current account was not sufficient to meet the cheque without resort to the money on deposit. It had been the practice of the bank to allow A. to overdraw her current account so long as the overdraft was covered by her money on deposit. The bank refused payment of the cheque, not because of the state of A.'s current account, but because they doubted A.'s signature on the cheque. A. died before anything further was done:—

Held, that in the circumstances there had not been any appropriation or dedication of the money in the bank, or any constructive payment of the cheque; and that there had been an incomplete gift inter vivos of the amount of the cheque, which gift would not be perfected by the assistance of equity.

Bromley v. *Brunton* (1868) L. R. 6 Eq. 275 disapproved.

Decision of Eve J. affirmed.

APPEAL from a decision of Eve J.

On April 26, 1923, shortly before her death, the testatrix gave the defendant, Mrs. Gifford, a cheque for 700*l.*, drawn on that day in her favour by the testatrix upon the Newcastle-on-Tyne branch of the National Provincial and Union Bank of England. This cheque was not honoured upon presentation, because the signature of the testatrix was badly written, and she had omitted the word "pounds" after the words "seven hundred," and it was returned marked "Signature requires verification. Cheque incomplete." The testatrix subsequently drew another cheque for 700*l.* in favour of the defendant, Mrs. Gifford, who presented it on April 30, 1923. On this occasion also the bank refused to honour the cheque, and marked it "Signature differs." The testatrix died on May 8, 1923, before anything further was done.

At the date when the latter cheque was presented there

was standing to the credit of the testatrix on deposit account at the bank the sum of 908*l.* 3*s.* 6*d.*, and on current account the sum of 131*l.* 9*s.* 5*d.*, and it appeared from an affidavit made by the plaintiff that money on deposit account was withdrawable upon one week's notice, but that it was the practice of the bank to honour the cheques of the testatrix to the extent of her deposit account.

Upon a summons raising (inter alia) the question whether the amount of the cheque had been properly given to the defendant, Eve J. held that there had been no effective gift of the money.

Mrs. Gifford appealed. The appeal was heard on October 15, 1925.

W. A. L. Raeburn for the appellant. This was a good gift inter vivos of the 700*l.* There was sufficient money to the donor's credit in the bank to meet the cheque, and in those circumstances no further act was necessary on the part of the donor to make the gift complete: per Stuart V.-C. in *Bromley* v. *Brunton*. (1) The bank refused to pay the cheque not because there was no money to meet it, but because of the way in which the signature was written. The only case in which comment has been made upon *Bromley* v. *Brunton* (1) is *In re Beaumont* (2), a case of a donatio mortis causa, in which Buckley J. explained the earlier decision on the ground that there was in effect an appropriation of the money at the bank to meet the cheque. The handing over of the cheque to the appellant showed an intention on the part of the donor to dedicate or appropriate this money. It had been the practice of the bank to cash the donor's cheques, even if involving an overdraft on her current account, so long as she had money on deposit account sufficient to meet the amount, and by this practice the bank led the donor to believe and expect that her cheque would be honoured, and the bank would in this respect have been estopped from refusing to pay the cheque. The bank did not mark the cheque in any way with reference to the donor's account, and subject to

(1) L. R. 6 Eq. 275, 277. (2) [1902] 1 Ch. 889.

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the verification of the signature, the bank obviously intended to pay the cheque. There was, I submit, a constructive payment of the money. Both *Hewitt* v. *Kaye* (1) and *In re Beak's Estate* (2) were cases of donatio mortis causa, and in neither case was the cheque presented before the death of the donor.

Arnold Jolly for the respondent plaintiff, the administrator with the will annexed.

G. R. B. Whitehead (*Dighton Pollock* with him) for the other respondent.

POLLOCK M.R. This appeal must be dismissed. The point raised is an interesting one, and it is unfortunate for the appellant, Mrs. Gifford, that the attempt to give her 700*l.* by the testatrix has failed. The facts are quite short. [His Lordship stated the facts and continued :] The question is whether or not 700*l.*, the amount of the cheque, has been properly given by the testatrix to Mrs. Gifford as a good gift inter vivos. It is said by Mr. Raeburn that in effect the money that stood at the bank was standing there for the purpose of meeting this gift—in other words, that it had been in effect transferred from the testatrix to Mrs. Gifford—and that on that basis there was an effective gift.

As a matter of fact, the testatrix had two accounts at her bank, a current account, on which there was a sum of 131*l.* 9*s.* 5*d.* standing to her credit, and a deposit account, on which there was a sum of 908*l.* 3*s.* 6*d.* standing to her credit. It appears from the sentence in the affidavit, which is accepted as the evidence to be relied upon by the Court, that " the said deposit account was withdrawable on one week's notice, but it was the practice of the bank to honour cheques of the testatrix to the extent of her deposit account." I am prepared in favour of Mr. Raeburn's argument to take that as meaning this : that inasmuch as the bank knew by the deposit account that they had a considerable sum which could be transferred to the current account, they would honour the cheques and debit them to the current account, looking to the ultimate

(1) (1868) L. R. 6 Eq. 198, 200. (2) (1872) L. R. 13 Eq. 489.

return from the deposit account into the current account; and I am prepared to put it as high as this: that the cheque may be treated possibly as if the whole amount was on current account.

Now a cheque is clearly not an assignment of money in the hands of a banker. A cheque, as explained by Lord Romilly M.R. in *Hewitt* v. *Kaye* (1), is nothing more than an order to obtain a certain sum of money, and it makes no difference whether the money is with the bankers or elsewhere. It is an order to deliver the money; and if the order is not acted upon in the lifetime of the person who gives it, it is worth nothing. Let me assume, therefore, that there was money in the current account ready to meet this cheque as and when it was accepted for payment by the banker, but it is clear law that the fact that this cheque was outstanding did not indicate that there had been any assignment of the money on current account to meet the cheque. It is merely a mandate or authority in the hands of the holder of the cheque to go to the bank and get the money from it. Under those circumstances, that being what this cheque was, was there a good gift inter vivos between the testatrix and Mrs. Gifford? It appears to me quite plain according to the authorities that there was not. In the case of *Hewitt* v. *Kaye* (1) a cheque was given, and it was not presented before the donor's death. In the present case it was presented, but the bank asked legitimately for confirmation of the signature, and a cheque holding a confirmation of the signature was not presented. Lord Romilly held in that case that the cheque did not operate as a good gift. "All the authorities," he says, "decide that there must be a complete delivery," that is, delivery not merely of the authority to receive, but of some property. In the case of *In re Beak's Estate* (2) a donor gave a cheque and with it gave the bankers' pass book, and Bacon V.-C. said that he did not see that the delivery of the bank pass book made any difference. There was no passing of any property. There was merely this order to receive money, and though it was very unfortunate

(1) L. R. 6 Eq. 198, 200. (2) L. R. 13 Eq. 489.

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that the intention of the parties should be disappointed by the death of the donor, still he followed the decision, or the principle of the decision, by Lord Romilly, and held that the gift was not effective.

These cases have recently been considered by Buckley J. in *In re Beaumont* (1), where he says: "In all the cases, in order that the gift may be valid, it must I think be shown that the donor handed over either property, or the indicia of title to property, which belonged to him." He points out that a cheque is not property, but only a revocable order such that if the banker acts on it, the donee will have the money to which it relates; and he followed the authority of *Hewitt* v. *Kaye* (2) and *In re Beak's Estate.* (3)

Somewhat differing from that is the case of *Bromley* v. *Brunton.* (4) It is fair to point out that Sir John Stuart V.-C., who decided that case, decided it on the basis that the donor had dedicated to the purpose of the gift the sum which was indicated by the cheque, and he says he conceives that under these circumstances no further act was necessary on the part of the donor to make the gift complete. Now if the Vice-Chancellor was able to find those facts—namely, that there had been an actual dedication of property, that no further act was necessary on the part of the donor to make the gift complete, and that there had been a transfer of the property—then I think that that case falls into line with the other cases, and his judgment can be supported. Whether I should have been able to construe the facts as amounting to what the Vice-Chancellor finds them to be is quite another question; but unless the basis of the case is that there had been an actual transfer of property and no further act necessary on the part of the donor to make the gift complete, it appears to me that *Bromley* v. *Brunton* (4) stands apart from, and is in contradiction with, the authority of the other cases to which I have referred, and can no longer be considered as law. Now in this case all that was received by Mrs. Gifford was a cheque. No indication had been given

(1) [1902] 1 Ch. 889, 894.
(2) L. R. 6 Eq. 198.
(3) L. R. 13 Eq. 489.
(4) L. R. 6 Eq. 275.

by the bank, by the certification of the cheque or otherwise, that they held a sum of money exclusively to answer the cheque; and under those circumstances it appears to me that the cheque remains a mere order to receive the money as and when it can be paid. It had no priority as against any other outstanding cheques. The banker was within his rights in what he did, and there was no effective gift of the sum of 700*l.* by the testatrix to Mrs. Gifford. I agree, therefore, with the decision of Eve J., and the appeal must be dismissed.

WARRINGTON L.J. I am of the same opinion. The question here is whether the testatrix made to the appellant, Mrs. Gifford, an effectual gift inter vivos of a sum of 700*l.* It is alleged by the appellant that such a gift has been made. The facts were that the testatrix drew the cheque for the amount of 700*l.* in favour of the appellant. The cheque was presented in the lifetime of the testatrix, but was not paid. It was not paid because the bank manager doubted the signature of the testatrix. He wrote upon the cheque the words, "Signature differs," and I think we must take it that the note expresses the reason, and the real reason, why the bank manager refused to pay. The state of the testatrix's account at the time the cheque was presented was this: On drawing account she had not enough money to satisfy the cheque—she had something over 100*l.* But on deposit account there was sufficient for the purpose. The money on deposit was only withdrawable on a week's notice; but there is a statement that it was the practice of the bank to honour the cheques of the testatrix to the extent of her deposit account. What that means is not quite clear. It was a statement made by the plaintiff on somebody's information, but I should read it as if we were bound to take that statement simply as it stands, neither adding to it nor taking from it; and as I read that statement, all it means is this—that so long as there was standing to the deposit account a sum sufficient to meet with the balance on current account any cheque drawn by the testatrix, the bank would not

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dishonour that cheque. It does not mean that the bank would make the payment out of the deposit. I take it that all it means is that they would make the payment relying on the money which they would have standing to the deposit account. That is a statement of fact under which it is claimed that there was a gift here inter vivos of 700*l.*

In the first place, in order to make an effectual gift inter vivos there must be an actual transfer of the subject of the gift or of the indicia of title thereto. A cheque is not money. It is not the indicia of title to money. A cheque is nothing more than an order directed to the person who has the custody of money of the testatrix requiring him to pay so much to the person in whose favour the cheque is drawn. The statement of Lord Romilly in *Hewitt* v. *Kaye* (1) is this, and it seems to me to be quite accurate: "A cheque is nothing more than an order to obtain a certain sum of money, and it makes no difference whether the money is at the bankers or anywhere else. It is an order to deliver the money; and if the order is not acted upon in the lifetime of the person who gives it it is worth nothing." Those words of Lord Romilly apply exactly to the present case. The cheque here was an order to pay a certain sum of money. It was not acted upon by the person to whom it was directed in the lifetime of the testatrix, and therefore, to use Lord Romilly's expression, "it is worth nothing."

Does it make any difference that there happened to be money at the bank sufficient to satisfy the amount of the cheque? I will first suppose that there had been a sufficient balance to the credit of the current account. Is that a sufficient circumstance of distinction? It is said that it is, and reliance is placed upon the decision of Stuart V.-C. in *Bromley* v. *Brunton* (2), which was a case of like nature—that is to say, the account in credit, the cheque in question presented, the cheque not honoured because there was some suspicion about the cheque—a doubt of the signature. With all respect to the judgment of Stuart V.-C. I share the doubt expressed by Buckley J. in *In re Beaumont* (3), as to whether

(1) L. R. 6 Eq. 198, 200. (2) L. R. 6 Eq. 275, 277.
(3) [1902] 1 Ch. 889.

it really can be supported. I think the vice of the judgment, if I may so express it, is found in the expression, " the effect of the cheque was to appropriate so much of the donor's money, and my opinion is that the funds, the subject of the gift, are in the hands of the executors just as much liable to the payment of the cheque as they were in the hands of the bankers." With all respect to Stuart V.-C. the drawing of the cheque does not, in my opinion, appropriate money in the hands of the bankers to the payment of that cheque. It authorizes and requires the bankers to pay it, but it is no appropriation of the money itself.

Buckley J. felt the difficulty about the judgment of Stuart V.-C., and he tried to explain it by the suggestion that there was a constructive payment of the money when the bank refused to pay, because they were not satisfied with the signature. It was as much as to say, " When we are satisfied it shall be treated as if we had paid the cheque when it was presented." I feel very great difficulty about introducing any such theory as that of constructive payment, and on the whole, if it were actually necessary to decide it, as at present advised, I should not follow *Bromley* v. *Brunton*. (1) I should even go further, and say that *Bromley* v. *Brunton* (1) must be treated as overruled. It is not actually necessary in the present case to go quite so far, because the current account was not in credit, and, therefore, the bank might have refused to pay this cheque on grounds other than that of a defect in the signature. It is attempted to get over that by saying that the bank would be estopped from refusing to pay because of the practice alleged in the affidavit. With all respect to Mr. Raeburn, I cannot follow that. When you read the affidavit in which the practice is referred to, and read it in the terms in which the paragraph is expressed, there was nothing to estop the bank. The utmost that can be said was that the bank had on previous occasions allowed the customer to overdraw so long as there was a sufficient security for the overdraft in the deposit account, but there would be nothing in that to compel the banker on another occasion to

(1) L. R. 6 Eq. 275, 277.

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allow the customer so to overdraw her account. I think, therefore, that this cannot be treated as coming under the principle of *Bromley* v. *Brunton*. (1) But if it does, then I think we ought not to follow *Bromley* v. *Brunton* (1), but treat it as overruled.

SARGANT L.J. I am of the same opinion. I think, with all respect to Mr. Raeburn, that this is a very plain case indeed, and I want to add something to what has been said from this point of view. I think that the matter has been perhaps a little confused inadvertently by counsel, by his reference to cases of donations mortis causa, though he in terms admitted that he was claiming this amount not as a donatio mortis causa, but as a donatio inter vivos. Looking at a well known text-book—White and Tudor's Leading Cases in Equity, 8th ed., vol. i., p. 425, under *Ward* v. *Turner* (2)—I find this passage with reference to the difference between a donatio mortis causa and a donatio inter vivos, "a donatio mortis causa . . . . differs from a gift inter vivos in the following important particular, namely, that an incomplete voluntary gift inter vivos will not be perfected by the assistance of equity, whereas in the case of a donatio mortis causa, equity will insist upon executors or administrators, as trustees for the donee, doing what may be necessary to complete the gift."

The cases which have been referred to were cases of donations mortis causa where there was an incomplete gift, and where equity nevertheless stepped in to make that gift, which was otherwise incomplete, complete. But here there is nothing of that kind at all. Here, claiming as on a donatio inter vivos, a person has the legal temerity to assert that the handing to her of a cheque is a good gift of the amount represented by that cheque. I will take it in favour of the donee, not that the donor had a current account supplemented by a deposit account which as a matter of practice was used or relied on by the bankers in order to allow an overdrawing of the current account, but that the total of both amounts was standing to the credit of the

(1) L. R. 6 Eq. 275. (2) (1752) 2 Ves. Sen. 431.

current account of the donor. Then the donor gives a cheque to the donee, and for some reasons—the insufficiency of the signature and so on, and on the first occasion the fact that the word " pounds " was not mentioned—the bank, who are merely the agents of the donor, do not pay the amount. Well, that is simply an incomplete voluntary gift; and as the donee claims on a gift inter vivos it seems to me to be absolutely and entirely plain that the gift gives no right at all to the donee to claim the sum of money represented by, or written on the face of, the cheque.

I go further and say that even if this had been claimed as a donatio mortis causa, the claim must fail. The mere instruction by means of a cheque to a banker to pay the money to the drawee of the cheque is not a gift. It is merely a revocable authority to the agent to make the payment; and the piece of paper containing that revocable authority is not a piece of property when it is given to the drawee by the drawer. It is merely the handing to the drawee of the means of entitling the drawee to obtain from the agent acting in pursuance of the authority the sum in question. In my judgment, even if this had been claimed as a donatio mortis causa, the claim must have failed; a fortiori it must fail when the claim is made as on a gift inter vivos.

I think I should add this, because I myself argued the case of *In re Beaumont* (1) before Buckley J. I am quite sure that Buckley J., then only a judge of first instance, although finding a possible way of reconciling *Bromley* v. *Brunton* (2) with the decision he was about to give, really thoroughly disapproved of the case. I also disapprove of the case, and I think that from this time forward it cannot be relied on.

Appeal dismissed.

Solicitors for appellant: *Ford, Lloyd & Co., for Swinburn G. Wilson, Newcastle-upon-Tyne.*

Solicitors for respondents: *Milner & Bickford, for Thomas Gee & Co., Newcastle-upon-Tyne; The Treasury Solicitor.*

(1) [1902] 1 Ch. 889. (2) L. R. 6 Eq. 275.

R. M.

TOMLIN J.

1925
Oct. 22.

In re FLEETWOOD'S POLICY.

[1925. F. 849.]

Insurance (Life)—Husband and Wife—Insurance by Husband for Benefit of Wife if living at his Death—Option to Insurer to receive Cash Value of Policy after Twenty Years—Option exercised by Husband—Right to Payment.

A husband took out an insurance policy for 500*l.* on his life, and by the terms of the policy the insurance company agreed to pay that sum to the insured's wife, if she were living at his death, or in the event of her prior death to pay it to the insured's executors, administrators and assigns. The policy contained a proviso that, if at the end of twenty years the insured was still living, he should have the right to exercise any of six specified options. The insured being then still living, he exercised an option to receive the entire cash value of the policy with its share of accumulated profits and to discontinue the policy. A sum of 288*l.* thus became payable.

The insurance company were unwilling to pay over this sum except on the joint receipt of the husband and wife, and ultimately paid it into Court:—

Held (1.), that the policy came within s. 11 of the Married Women's Property Act, 1882, and created a trust in favour of the wife in certain events; (2.) that the insured must be taken to have exercised the option for the benefit of the trust; and (3.) that, unless the husband and wife came to an agreement, the fund must be accumulated in Court until it could be ascertained by the death of either party who was entitled to it.

In re Equitable Life Assurance Society of the United States & Mitchell (1911) 27 Times L. R. 213 applied.

Adjourned Summons.

On November 19, 1904, Charles Fleetwood effected a policy of assurance, No. 1,133,578, on his life with the New York Life Insurance Company for the sum of 500*l.* By the terms of the policy the company "agrees to pay 500*l.* sterling to Louisa Ann Fleetwood . . . . the wife of the insured, or in the event of her prior death to the insured's executors administrators or assigns" upon receipt and approval of proofs of the insured's death. The premium payable under the policy was the annual sum of 14*l.* 19*s.*

The policy conferred the following right to participate in the profits of the company: "If the insured is living on the 19th day of November, 1924, which is the end of the twenty

year accumulation period of this policy, and if the premiums have been duly paid to that date and not otherwise, the company will then apportion to this policy its share of the accumulated profits and the insured shall then have the option of one of the following six accumulation benefits :—

(1.) Receive the profits in cash and continue this policy by payment of the original premium ; or

(2.) Receive the profits converted into an annual income for life and continue the policy by payment of the original premium ; or

(3.) Receive the profits converted into additional paid-up insurance, subject to evidence of insurability satisfactory to the company, and continue this policy by payment of the original premium ; or

(4.) Receive the entire cash value, as stated below, converted into an annual income for life, and discontinue this policy ; or

(5.) Receive the entire cash value, as stated below, in cash and discontinue this policy ; or

(6.) Receive the entire cash value, as stated below, converted into paid-up insurance payable at death and discontinue this policy."

And the company guaranteed that the entire cash value of the policy at the end of the accumulation period should be 174*l.*, and in addition the cash profits then apportioned by the company.

All premiums were duly paid up to November 19, 1924, and on September 22, 1924, the company sent the insured a notice that the cash profits apportioned to the policy, if withdrawn in cash, would be 113*l.* 15*s.* 7*d.* Shortly afterwards the insured wrote to the company exercising his option to be paid in cash, the guaranteed value of the policy together with the apportioned profits. On November 19, 1924, the company accordingly sent to the insured a cheque for 288*l.* 15*s.* 7*d.* ; but the cheque was made payable to the insured and his wife jointly.

The insured and his wife had some years earlier separated by mutual consent, and the insured returned the cheque to

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TOMLIN J. 1925 FLEETWOOD'S POLICY, *In re.*

the company asking for payment by a cheque drawn in his favour alone. The company refused to pay the insured the policy money, unless his wife would join in giving a receipt, and ultimately the company paid the sum of 288*l.* 15*s.* 7*d.* into Court to a ledger account intituled " In the matter of the policy No. 1,133,578 of the New York Life Insurance Company on the life of Charles Fleetwood."

This summons was taken out by the insured asking that the sum of 288*l.* 15*s.* 7*d.* standing in Court to the above ledger credit might be ordered to be paid out to him.

Greenland for the husband. The trust in favour of the insured's wife is no longer subsisting. That trust was contingent not only on her surviving her husband but also on the husband's not exercising at the end of twenty years any of the options that would put an end to the policy. It is said that the wife has an interest by virtue of the Married Women's Property Act, 1882, s. 11, but any such right must be subject to the terms agreed: *In re Ioakimidis' Policy Trusts.* (1) The Married Women's Property Act, 1882, s. 11, only operates to create a trust in favour of a wife or child, where an insurance is effected for her or their benefit by the husband. Apart from that Act, no right would be conferred on her or them which could be enforced: *In re Engelbach's Estate* (2); *Cleaver* v. *Mutual Reserve Fund Life Association.* (3) There is nothing to prevent the insured exercising an option conferred by the policy so as to put an end to the wife's interest: *Ex parte Dever.* (4)

It is true that in *In re Equitable Life Assurance Society of the United States & Mitchell* (5) the contrary view seems to have been taken. The case as reported is difficult to understand, and the conclusion arrived at appears to be the result of a compromise. Possibly the explanation is that the trustee for creditors of the insured was held to be unable to exercise the option in that case. The terms of the

(1) [1925] Ch. 403, 406.
(2) [1924] 2 Ch. 348, 352.
(3) [1892] 1 Q. B. 147.
(4) (1887) 18 Q. B. D. 660, 664.
(5) 27 Times L. R. 213.

policy in the present case make it clear that it was the insured who was to have the right to exercise any of the options, and the only benefit conferred on the wife is if she survives the husband. That must be subject to the right of the husband to put an end to the policy during his life. It resembles a settlement where the settlor reserves a right to put an end to it in certain circumstances. There is a provision in this policy enabling the insured to borrow money on it. The necessary inference is that he could destroy the wife's interest in it.

J. E. Harman for the wife. The insured is precluded from doing anything to annul the trust which he has declared on effecting this policy. Under s. 11 of the Married Women's Property Act, 1882, a trust has been created that is binding when once made against the husband. The wife is a cestui que trust of the money in Court contingently upon her surviving her husband. It may be indeed that the husband must be treated as having commuted the policy for her benefit, so that she is now entitled to the money in Court; but if the true view is that she is only contingently interested in it, the money must stay in Court until she or her husband dies. The money will then belong to the survivor. The powers in the policy can only be exercised in a manner that will not abrogate the trust created: *In re Equitable Life Assurance Society of the United States & Mitchell* (1) is a direct authority to this effect. The other cases which have been cited are not in point. It is suggested that the husband by exercising the option to commute the policy has accelerated the trust, so that the wife is now entitled to the sum in Court.

TOMLIN J. The question that I have to decide in this case is as to the respective rights of a husband and wife in a sum in Court of 288*l.* 15*s.* 7*d.* representing the proceeds of a policy taken out in the New York Life Insurance Company on November 19, 1904, by the husband.

The policy is apparently in a form used by the insurance company to meet either of two possible cases—namely, the

(1) 27 Times L. R. 213.

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case where there is a beneficiary designated in the policy or the case where there is no beneficiary designated. I gather that from the statement at the bottom of the second page of the policy under the heading "instalment benefits," where it says: "If a beneficiary is designated herein, the insured may change the payment of the proceeds of this policy from payment in one sum, as provided on the first page hereof, to payment by annual instalments," so that it clearly contemplates that a policy in this printed form may be utilized for one or other of the two alternatives.

It is quite plain from the terms of the policy that it is a policy on the life of the husband, and that the proceeds will belong to the wife if she survives the husband, but otherwise to the husband. After stating this, the policy proceeds: "This policy participates in the profits of the company as herein provided. If the insured is living on the 19th day of November, 1924, which is the end of the twenty year accumulation period of this policy, and if the premiums have been duly paid to that date, and not otherwise, the company will then apportion to this policy its share of the accumulated profits and the insured shall then have the option of one of the following six accumulation benefits." [His Lordship then read some of these options.] There follows in the policy a statement that the company at the end of the accumulation period will send a written statement of the results under each of the six accumulative benefit options: and the company guarantees the entire cash value of the policy at the end of the accumulation period at 174*l.* and in addition thereto the cash profits then apportioned by the company. There is also a provision in the policy under which cash loans can be obtained by the insured on the security of the property in accordance with the table which is set out.

On November 19, 1924, being the date of the expiration of the accumulation period, both husband and wife were still living, and the husband exercised the option conferred on him by the policy in the fifth alternative, that is to say, he elected to "receive the entire cash value, as stated below, in cash, and discontinue this policy." On that footing there

was payable by the company some 288*l*. The company, I understand, were prepared to pay that sum to the husband and wife jointly. Unfortunately, differences have arisen between husband and wife and they are living apart; and apparently they have been unable to agree as to the adjustment of their rights under the policy, and were not prepared jointly to accept payment from the company. The company has therefore paid the fund into Court, and this application is made by the husband in the presence of the wife to have it determined what are their respective rights in the fund.

On the part of the husband it is said that while it is true that the policy is expressed to be for the benefit of the wife in the event of her surviving the husband, yet there are provisions in the policy which in terms confer upon the husband the absolute right to destroy his wife's interest. His contention is that, if at the end of the accumulation period he and his wife are both still living, he is free to exercise one or other of the several options provided for by the policy; and that, if by so doing, he puts an end to the policy, his wife's interest under the policy ceases, and he is entitled to put into his own pocket any benefit which results from his exercise of the particular option.

The wife, on the other hand, says that as she is, although contingently only, a beneficiary under the policy, the husband must, when he exercises one of the options, be exercising it for her benefit, and that either she is to-day entitled to take the sum received as the result of the exercise of this option or, alternatively, that sum must be held in medio until the happening of the event which determines finally whether the husband or the wife is the person entitled to the fund.

A number of cases have been cited to me, and my attention has also been called to s. 11 of the Married Women's Property Act, 1882. In my view that section applies to this policy. The policy is, in the terms of the section, a policy of assurance effected by a man on his own life, and expressed to be for the benefit of his wife. It is true it is expressed to be for the benefit of his wife in a certain event only, but the fact that

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the benefit is of a limited or contingent character does not prevent it from being a benefit within the meaning of this Act. I think, therefore, that the policy creates a trust in favour of the wife, but only in the terms of the trust.

That throws one back upon the policy for the purpose of determining what in fact is the extent of the trust created for the wife's benefit. Among the cases which have been cited to me there is one which is relevant to the question which I have to decide: *In re Equitable Life Assurance Society of the United States & Mitchell* (1), which was decided by Swinfen Eady J. In that case a policy had been effected by the husband, and it was expressed to be a contract for the payment of the policy money by the society to the wife for her sole use, if she should be living at a time, which on construction was held to be the death of the husband. If she was not then living the policy enured for the benefit of the children of the husband, and if there were no children, for the benefit of the husband's estate. The policy was framed, as I gather from the report, upon lines very similar to the policy in the present case. Thus there was a provision under which at a certain period the insured had the right to exercise one of a number of options much on the lines of the six accumulation benefits here. In that particular case, it appeared that the husband, being in financial difficulties, assigned to a trustee for creditors all his property in terms which were wide enough to cover his interest in the policy, and that the trustee at the given period claimed the right to exercise one of the options under the policy. The wife was then dead, but there was a daughter living who claimed the benefit of the policy. The society proceeded upon the footing that the first option was exercised. This, as far as I can gather, corresponded more or less with the fifth option here and gave the right to receive the cash value of the policy, and on that footing the society paid a sum into Court. Swinfen Eady J. held on the construction of the policy that it was within s. 11 of the Married Women's Property Act, and that it was not the less a policy for the benefit of the

(1) 27 Times L. R. 213, 214.

wife and children, because in case of their death in the lifetime of the insured the policy money was to be for the insured's benefit. Then the report continues: "In his Lordship's opinion the contention for the infant, that the options could only be exercised for the benefit of the persons for whom the trust was created, was the true one. So long as any objects of the trust remained unperformed the trusts could not be defeated, and the options must be exercised in the best manner for the benefit of those entitled." In other words Swinfen Eady J. held that while under the policy certain powers and options were to belong to the insured, yet as there was a beneficiary under the policy in addition to the insured, all the powers and options of the insured under the policy must be treated as exercised by him either as trustee or as absolute owner, according as he or the beneficiary ultimately became entitled to the benefit of the policy.

I feel great difficulty in finding anything in this policy which enables me to distinguish it from the policy in the case before Swinfen Eady J. Mr. Greenland has pressed upon me that the presence in this policy of provisions for cash loans makes all the difference. I am unable to distinguish the case on that ground. It seems to me that the presence in the policy of powers which the insured may or may not be entitled as against the beneficiary to exercise, does not enable me to construe this policy as one which, in respect of these options, gives the insured the right to destroy the rights of the beneficiary. It may be that if he had done his duty to the full, he would have exercised the option conferred upon him by electing to have the policy converted into a paid up insurance payable at his death; but he has not done so. In the result, I think that neither of the parties are to-day entitled to the fund. The fund must remain in Court and be accumulated until either the parties come to some agreement or one or other of them dies.

Solicitors: *Walter Crimp & Co., for Stanley Richards & Norrington, Paignton; Gibson & Weldon, for A. C. Howard, Paignton.*

H. C. G.

TOMLIN J.

1925.
Oct. 15, 16, 27.

In re DELOITTE.

GRIFFITHS *v.* DELOITTE.

[1925. D. 546.]

Will—Accumulations—Direction to accumulate beyond Period permitted by Thellusson Act—Gift of Accumulations to Children of Annuitant—Right to stop Accumulations—Claim to treat Class of Children as closed—Presumption that Annuitant past Child-bearing—Thellusson Act (39 & 40 *Geo.* 3, *c.* 98).

It is not permissible in determining rights at law to inquire into the capacity of a woman to bear children.

A testatrix, who died in January, 1904, bequeathed a fund of 25,000*l.* to trustees upon trust out of the income to pay to a niece the annual sum of 500*l.* during her life and to accumulate the surplus income; and from and after the death of the niece the testatrix directed her trustees to hold the fund and the accumulations (subject to a discretionary power to apply part of the income of the fund for the benefit of the niece's husband) In trust for all the children of the niece who should, whether living at the testatrix's death or born afterwards, attain the age of twenty-one years. The will also contained a residuary gift.

At the end of twenty-one years from the testatrix's death, there were six children of the niece, all of whom had long since attained twenty-one years of age; and the niece was sixty-five years old:—

Held, that the Court ought not, for the purpose of closing the class of the niece's children, to make the presumption that the niece was past child-bearing; that the existing children could not therefore be treated as the only persons interested so as to be entitled to stop the accumulations; that there was, therefore, an effective direction for accumulations beyond the period sanctioned by the Thellusson Act, with the result that as from the end of that period the surplus income fell into residue.

Jee v. *Audley* (1787) 1 Cox, 324; *In re Dawson* (1888) 39 Ch. D. 155; and *In re Travis* [1900] 2 Ch. 541 applied.

Adjourned Summons.

By her will dated July 6, 1901, Mary Ann Deloitte, after appointing executors and trustees and making certain specific bequests and devises, devised and bequeathed all her real and personal estate not thereby otherwise disposed of unto her trustees upon trust for sale and conversion, and after payment of her funeral and testamentary expenses, debts, and legacies, to invest the residue of the money arising

from the sale and conversion and hold the investments upon the trusts therein mentioned.

The first trust was as follows: "As to the sum of Twenty five thousand pounds in Trust out of the Income arising therefrom to pay the annual sum of Five hundred pounds by equal monthly or quarterly instalments as my Trustees shall think fit to my said niece Annie Louisa Gosling during her life for her separate use independently of any husband and so that she shall not have power to dispose thereof by way of anticipation and she maintaining and educating her children And if the said Charles Gosling shall survive the said Annie Louisa Gosling my Trustees shall be at liberty if they think fit but not otherwise to pay to him during his life out of such income the annual sum of One hundred and fifty pounds by half yearly quarterly or other periodical payments And shall accumulate the residue of all such income which shall not be applied or paid as aforesaid in the way of compound interest by investing the same and the resulting income therefrom from time to time and the same shall follow the dispositions made hereafter as to the said Capital sum of Twenty five thousand pounds And from and after the decease of my said Niece Annie Louisa Gosling my said Trustees shall stand possessed of the said sum of Twenty five thousand pounds and accumulations and investments representing the same subject to the discretionary power hereinbefore given to my said Trustees to pay the yearly sum of One hundred and fifty pounds to the said Charles Gosling as hereinbefore provided In Trust for all the children or any the child of my said Niece who shall whether living at my death or born afterwards attain the age of twenty-one years."

A power followed for the trustees to raise any part not exceeding in the whole one-third of the presumptive or vested share of any child of Mrs. Gosling for his or her advancement or benefit otherwise than maintenance and education. The testatrix then proceeded to give a number of legacies, and as to the rest, residue, and remainder of her estate she devised and bequeathed the same to John

TOMLIN J. 1925 DELOITTE, *In re.* GRIFFITHS *v.* DELOITTE.

George Griffiths in terms which appeared to amount to an absolute gift.

The testatrix died on January 9, 1904. Her niece, the defendant, Mrs. Annie Louisa Gosling, was born in February, 1860. She had had six children, all of whom were defendants and had long since attained the age of twenty-one years.

The fund of 25,000*l.* had been duly set aside and invested. The income of the fund had always been more than sufficient to pay Mrs. Gosling's annuity of 500*l.*, and considerable sums of surplus income had been accumulated in the hands of the trustees. The period of twenty-one years from the death of the testatrix expired on January 9, 1925.

This summons was taken out by the present trustees of the will to have it determined:

1. Whether the annuity of 500*l.* a year given to Mrs. Gosling was payable out of current annual income of the legacy of 25,000*l.* and not out of accumulations of surplus income already made.

2. Whether upon the true construction of the will and in the events which had happened the six children of Mrs. Gosling and their incumbrancers were entitled to have handed to them the accumulations made during the twenty-one years immediately following the death of the testatrix out of surplus income.

3. Whether the same six children and their incumbrancers were entitled to stop the further accumulations of the surplus income of the legacy of 25,000*l.* and to have the surplus income paid over to them as it accrued.

4. Who were entitled, as from the expiration of twenty-one years from the death of the testatrix (subject to the annuity of 500*l.* and to any payments to be made out of the income of the legacy of 25,000*l.* to Charles Gosling), to the income of: (*a*) the legacy of 25,000*l.*; (*b*) the accumulations made during the period of twenty-one years from the testatrix's death.

L. W. Byrne for the summons.

F. Whinney for Mrs. Gosling.

Simonds K.C. and *Swords* for Mrs. Gosling's children. Mrs. Gosling's annuity is not payable out of accumulations in which she has no interest. If then Mrs. Gosling's six children, who are all sui juris, are an ascertained class, they are the only persons interested after Mrs. Gosling's death in the 25,000*l.* legacy and the accumulations, and they can put a stop to the accumulations: *Saunders* v. *Vautier*. (1)

The Court is in that case entitled to disregard the Thellusson Act, and the fact that the direction for accumulations would become void under it at the end of twenty-one years from the death of the testatrix. The accumulations will be stopped, and the past accumulations and any future surplus income will be immediately distributable amongst the six children: *Wharton* v. *Masterman*. (2)

It will be said, however, that the class of children is not finally ascertained, because for the purpose of determining a class of legatees the Court cannot assume that a married woman, whatever her age, is past child-bearing. The suggestion will be that, although Mrs. Gosling is sixty-five years of age, the class of her children cannot be treated as closed, with the result that the six children only have vested interests which are liable in the eye of the law to be partially divested on the birth of additional children: *Weatherall* v. *Thornburgh* (3); *In re Travis*. (4) It is submitted that this is incorrect. *In re Travis* (4) is distinguishable, because there the Court was asked to assume that a lady was past child-bearing in order to convert the contingent interests of a class into vested interests. Here Mrs. Gosling's children have vested interests, and the Court is only asked to hold that the circumstances in which they would be partially divested have become impossible and cannot arise: compare *In re Lowman*. (5)

Further, the application of the principle of *Saunders* v. *Vautier* (1) is not dependent on its being possible to predicate at the date of the testatrix's death that the Thellusson Act will not apply. It is sufficient if, at the date when that Act

(1) (1841) 4 Beav. 115.
(2) [1895] A. C. 186.
(3) (1878) 8 Ch. D. 261.
(4) [1900] 2 Ch. 541, 549.
(5) [1895] 2 Ch. 348.

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would begin to operate, it can be shown that there is no effective direction to accumulate.

L. F. Potts and *A. Ellis* for the incumbrancers of children's shares.

Spens K.C. and *Danckwerts* for the residuary legatees. The accumulations cannot be stopped by the beneficiaries and, as the accumulations are illegal under the Thellusson Act after twenty-one years from the testatrix's death, the surplus income arising until Mrs. Gosling's death will fall into residue. In *Wharton* v. *Masterman* (1) the class of beneficiaries was completely ascertained at the testatrix's death, and it was then known with certainty that upon the principle of *Saunders* v. *Vautier* (2) the Thellusson Act could never become applicable. Nothing less than this will suffice; it must be possible at the death to predicate that the Thellusson Act can never apply. If at the death circumstances exist to make it applicable, the position cannot be altered by subsequent events turning an unascertained into an ascertained class: *In re Parry.* (3)

In this case, however, it is unnecessary to put the residuary legatees' contention so high. The class of beneficiaries here can never be finally ascertained till Mrs. Gosling's death. It would be an extraordinary result if the date of ascertaining a class of beneficiaries was to be the uncertain date when a lady became past child-bearing.

The Court will only act on the presumption that a lady is past child-bearing in matters of administration to enable a trust fund to be distributed. It will never do so when it is a question of determining beneficial rights. That is clear from *In re Travis* (4), which is directly in point. It follows that there is no ascertained class in existence that can put a stop to the accumulations.

Cur. adv. vult.

Oct. 27. TOMLIN J. delivered the following written judgment. The object of this summons is to determine the rights of the parties under the will of the testatrix who

(1) [1895] A. C. 186.
(2) 4 Beav. 115.
(3) (1889) 60 L. T. 489.
(4) [1900] 2 Ch. 541.

died on January 9, 1904, in a fund set aside pursuant to the trusts of the will to answer an annuity and in accumulations of past income arising from the fund and in the future income of the fund and its accumulations. [His Lordship then read the material part of the testatrix's will and stated the facts.]

The first question to be determined is as to the interest (if any) of the annuitant and her husband in the surplus income and the accumulations thereof.

In my opinion, upon the true construction of the will neither Mrs. Gosling nor her husband has any interest in the accumulations. Such accumulations could not, I think, be resorted to for payment of any arrears of any annuity. I express no opinion as to whether Mrs. Gosling's annuity or any annuity which may become payable to her husband constitutes a continuing charge on the income of each year, that is to say, whether before any surplus is ascertained in any year all arrears in previous years have to be made good. That question has not arisen and is not likely to arise, and does not affect the other questions which I have to determine.

My next task is to decide what are the rights in regard to (*a*) accumulations made prior to January 9, 1925, and (*b*) surplus income arising after that date from the fund and accumulations.

It is said on behalf of the six children of Mrs. Gosling that their mother having become long since past child-bearing they were in a position before the period of twenty-one years from the death of the testatrix expired to stop the accumulations, in which no one but themselves could have any interest, and that the case is covered by the decision of the House of Lords in *Wharton* v. *Masterman*. (1)

On the other hand, it is said on behalf of the representatives of the residuary legatee that, inasmuch as there is no gift of the accumulations except to a class who as a matter of law can only be ascertained at Mrs. Gosling's death, there is not and cannot be till such death any person entitled to stop the accumulations, and that the case is one to which the Thellusson Act applies and that the surplus income since

(1) [1895] A. C. 186.

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January 9, 1925, until the death of Mrs. Gosling falls into residue.

In considering the application of the Thellusson Act my course is clear. I have first of all to construe the will, and having construed the will, if I find that in any event there is a direction for accumulation extending beyond the permitted period of a kind which cannot be stopped by the application of the principle of *Wharton* v. *Masterman* (1), I must say that after such period the Act applies and produces the same result as though the testator had directed that at the expiration of the period the accumulations should stop, with the result that there would be a gap, and the surplus income between the end of the period to the death of Mrs. Gosling would be undisposed of except so far as it was carried by the residuary gift: see judgment of James L.J. in *Weatherall* v. *Thornburgh*. (2)

Putting aside for the moment the question of Mrs. Gosling's age, I think that I am bound to construe this will as containing a direction to accumulate during Mrs. Gosling's life, with a gift of the original corpus and of the accumulations to a class consisting of her children who attain the age of twenty-one years, and therefore not ascertainable till Mrs. Gosling's death or within twenty-one years after her death.

Upon this view of the will, I do not think that it can be said that at any time during Mrs. Gosling's life there is other than an effective direction for accumulation which apart from the Act would have to be given effect to. Upon this footing the Act will apply, and after the twenty-one years the surplus income will fall into residue.

Can I modify this result by having regard to the age of Mrs. Gosling? I think not. It seems to me to have been laid down with great force on many occasions that it is not permissible in determining rights in law to inquire into the capacity of persons to beget or bear children. Lord Kenyon in *Jee* v. *Audley* (3), in which the matter was considered with reference to the rule against perpetuities, says: "I am

(1) [1895] A. C. 186. (2) 8 Ch. D. 261, 268.
(3) 1 Cox, 324, 325.

desired to do in this case something which I do not feel myself at liberty to do, namely to suppose it impossible for persons in so advanced an age as John & Elizabeth Jee to have children; but if this can be done in one case it may be in another, and it is a very dangerous experiment, and introductive of the greatest inconvenience to give a latitude to such sort of conjecture."

Of this judgment Chitty J. in *In re Dawson* (1) says as follows: "It is clear that Lord Kenyon was considering the case generally, and it is clear that if he had admitted the evidence in this case, or admitted any argument with regard to the impossibility of issue, it would have followed that he must, and that the Court must, in every other case make an inquiry into the possibility of issue other than that which arises from death. As I pointed out in the argument, if medical testimony was admitted in this case for the purpose of shewing that the lady was past child-bearing, it would equally be admitted as a matter of law in the case of a woman of younger age, and it may be medical testimony could shew that she was incapable of bearing a child, and evidence of that class might, therefore, consistently with the supposed principle, be adduced in the case of a woman of thirty or even younger: and if the principle is pursued in this way, there could be no ground for rejecting evidence in the case of a man. It is unnecessary to pursue that. Of course the probability is not great, but there are cases, I take it, in which it could be proved that it was impossible for a man to have children. The Master of the Rolls appears to me to have deliberately rejected this argument on grounds which appeared to him to be sufficient, and he speaks of the danger of the experiment and the great inconvenience and the latitude which would be introduced into the law. That is a decision pronounced, as I have said, more than a century ago, and it is cited in the text-books without any adverse comment. It has also been mentioned by several eminent judges since, and with approval. It may be that sometimes rhetorical phrases are applied even by eminent judges to propositions

(1) 39 Ch. D. 155, 161.

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of law. In *Lord Dungannon* v. *Smith* (1) Lord Brougham in eloquent language described it as ' one of the corner stones of the law,' and I understand the Lord Chancellor in the same case to have considered the decision in *Jee* v. *Audley* (2) to be one of the land-marks."

There is also support for the same view in an authority earlier than *Jee* v. *Audley* (2), and cited to Chitty J. in *In re Dawson* (3), and accepted by him as relevant—namely, a passage in Coke upon Littleton, vol. i., s. 53, dealing with a woman's right to dower. The section is as follows: " And also, in every case where a woman taketh a husband seised of such an estate in tenements, &c.: so as by possibilitie it may happen that the wife may have issue by her husband, and that the same issue may by possibilitie inherit the same tenements of such an estate as the husband hath, as heire to the husband, of such tenements she shall have her dower, and otherwise not. For if tenements be given to a man, and to the heires which he shall beget of the bodie of his wife, in this case the wife hath nothing in the tenements, and the husband hath an estate but as donee in special taile. Yet if the husband die without issue, the same wife shall be endowed of the same tenements; because the issue, which she by possibility might have had by the same husband, might have inherited the same tenements. But if the wife dyeth, living her husband, and after the husband takes another wife, and dieth, his 2. wife shall not be indowed in this case, for the reason aforesaid." And then the note is as follows: " ' So as by possibility it may happen that the wife may have issue by her husband.' Albeit the wife be a hundred yeares old, or that the husband at his death was but foure or seven yeares old, so as she had no possibilitie to have issue by him, yet seeing the law saith, that if the wife be above the age of nine years at the death of her husband, she shall be endowed, and that women in ancient times have had children at that age, whereunto no woman doth now attaine, the law cannot judge that impossible, which by nature

(1) (1846) 12 Cl. & F. 546, 631. (2) 1 Cox, 324.
(3) 39 Ch. D. 155.

was possible. And in my time, a woman above threescore yeares old hath had a child, and ideò non definitur in jure." Chitty J. thought and I respectfully agree that that passage meant that no legal proposition can be founded on the impossibility of issue.

Further the same principle seems to me to have been applied by the Court of Appeal in *In re Travis* (1), a case in which the question of the application of the Thellusson Act arose. It is said, however, that this last mentioned case can be distinguished, because there the gift was contingent while here it is vested subject to partial defeasance by the birth of other children. I am unable however to see the value of this distinction, if in fact I must determine the rights without regard to the capacity or incapacity of the parents to bear further children.

It has also been urged upon me that in administration the Court will sometimes give liberty to distribute a fund on the footing that there can be no more children, and that this is a ground for taking into account Mrs. Gosling's age. There are no doubt cases where on any view none but members of a particular class can take and where, though this class is theoretically capable of increase, it cannot in fact be increased. In such cases the Court, acting administratively and not as a Court of construction, will for convenience distribute on the footing that the class is closed. Such a course, however, could never be taken where as here so to act would affect the rights of other parties taking in certain events against the class.

I must therefore hold that upon the true construction of the will and in the events which have happened the income accrued or accruing between the expiration of the period and the death of Mrs. Gosling falls into residue.

This is a result which may appear, at any rate to those who do not profit by it, as one to be regretted, because it defeats the expressed intention of the testatrix; but that is the purpose of the Act, and the construction which has brought this matter within the ambit of the Act results not from

(1) [1900] 2 Ch. 541.

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adherence to a blind technicality, but from the application of a principle of public utility forbidding for the purpose of determining legal rights the employment of an inquiry of a kind often detrimental to prosecute and difficult if not impossible to answer, and calculated if permissible to throw upon the dispositions of testators a cloud of uncertainty.

[His Lordship answered the questions in the summons by declaring in answer to the first question that the annuity of 500*l.* was not payable out of accumulations; by answering questions 2 and 3 in the negative, and by declaring that as from the end of twenty-one years from the death of the testatrix the income mentioned in question 4 fell into residue.]

Solicitors: *Wansey, Stammers & Co.; Rooper & Whately; Coward, Chance & Co.*

H. C. G.

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[1924. S. 3445.]

Education—Public elementary (provided) School—Married Women Teachers—Appointment at Pleasure—Dismissal—Statutory Powers—Discretion—Bona fide Exercise—Reasons—Notice—Validity—Education Act, 1921 (11 & 12 *Geo.* 5, *c.* 51), *s.* 17, *s.* 148, *sub-s.* 1.

The defendants, the Local Education Authority, in pursuance of a report of their Education Committee, decided that the retention of married women teachers in their public elementary schools was inadvisable, and gave the plaintiff, a married woman teacher, notice to terminate her engagement, after satisfying themselves that her husband was able to maintain her. The plaintiff had, while unmarried, been appointed in 1914 assistant mistress of one of the defendants' schools, and was admittedly an efficient teacher. In a letter to the managers of the non-provided schools of the district announcing the decision of the Education Committee, and expressing a hope that the managers would take similar action, it was stated that the Committee were led to their decision for the following reasons: (1.) They considered the duty of the married woman was primarily to look after her domestic concerns, and they regarded it as impossible for her to do so and to act effectively and satisfactorily as a teacher at the same time; and (2.) that it was unfair to the large number of unmarried teachers who

were at present seeking situations that the positions should be occupied by married women who presumably had husbands capable of maintaining them. The plaintiff sought a declaration that the notice was invalid, and an injunction restraining the defendants from acting upon it:—

Held (reversing the decision of Romer J.), that the plaintiff had failed to establish that the defendants had taken into account matters other than those which belonged to their educational sphere; that neither their decision nor either of the reasons upon which it was alleged to be founded was alien or irrelevant to the maintenance of the efficiency of the public elementary schools or the cause of education in the district; that their willingness to make concessions in cases of grievous hardships did not invalidate their policy of maintaining educational efficiency; and that as the defendants had acted bona fide and within their statutory powers, the Court would not interfere.

WITNESS ACTION.

On March 30, 1914, the plaintiff, who was then unmarried, was appointed by the defendant Council certificated assistant teacher of the girls' department of Heatherlands Council School—one of the public elementary schools provided by the defendants as the Local Education Authority for the area in which the school was situate. By letter dated July 30, 1924, the town clerk of the defendants gave to the plaintiff notice on their behalf to terminate her engagement at the expiration of one calendar month from the service of such notice. By the writ in this action, issued on August 19, 1924, the plaintiff sought a declaration that the notice was invalid and inoperative and claimed an injunction to restrain the defendants from acting on the notice or attempting to enforce it in any way. Pending the trial of the action the plaintiff, by arrangement between the parties, continued to discharge her duties at the school.

From the documentary evidence adduced at the hearing of the action it appeared that in May, 1924, the Council adopted the recommendation of a Committee that notice should be given to the married women teachers employed in their Council schools that their engagement would be terminated in accordance with the terms of their engagement, unless some satisfactory reason could be given for the engagement to be continued. A letter was, also, in that month, written by the town clerk to the several managers of the non-provided

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schools in the district, in which the reasons for the decision of the Committee were stated to be that they considered: (1.) that it was the primary duty of married women to attend to their domestic concerns, and (2.) that it was unfair to the large number of unmarried teachers who were at that time seeking situations that the positions should be occupied by married women who presumably had husbands capable of maintaining them.

The action came on for hearing before Romer J. on July 13, 1925.

Clauson K.C. and *A. A. Thomas* for the plaintiff. The considerations which influenced the local authority in giving notice of dismissal to the plaintiff are alien and irrelevant to the discharge of their statutory duties. By s. 17 of the Education Act, 1921, it is provided that local education authorities shall "maintain and keep efficient" the public elementary schools within their area. The words "maintain and keep efficient" are the key to the whole matter. Where there exists a body to which, by statute, certain public duties have been assigned, that body, for the purposes of exercising its discretion, is not wholly unfettered. That proposition is established by *Price* v. *Rhondda Urban Council.* (1) The Council must in all their actions be bona fide governed by the intention of carrying out the duty entrusted to them. So long as they are bona fide guided by the intention, and the sole intention, of efficiency, the plaintiff would have no cause of complaint. Investigation was made in the present case as to the financial position of the married women teachers and of their husbands. Such inquiries could only be justified if the local authority has power to regulate the domestic and sociological conditions of the district. Considerations of that nature are wholly alien and irrelevant to the discharge of their duties in a matter of this kind. In *Sadler* v. *Sheffield Corporation* (2) it was held that the Corporation could not act on mixed grounds, i.e., partly on educational grounds

(1) [1923] 2 Ch. 372. (2) [1924] 1 Ch. 483.

and partly on other grounds: see also *Rex* v. *Board of Education*. (1)

Maugham K.C. and *C. D. Myles* for the defendant Council. In dealing with a matter of this kind the local authority is bound to take many points into consideration. The interests of the teacher who replaces the retiring teacher must be considered as well as those of the retiring teacher. The local authority, having appointed a teacher at their pleasure, may remove that teacher at their pleasure, provided that they have not acted on a reason wholly alien to their duties. Their decision on such a matter cannot be questioned. The reasoning of the Council appears to be that married women would not be so efficient in the schools as unmarried women. Both the reasons for dismissal, which are challenged, are reasons which may properly be taken into consideration by the local authority. They were not bound to give any reasons and their reasons, if given, could not be questioned, unless it could be shown that they had acted in a corrupt manner: *Hayman* v. *Governors of Rugby School* (2) and *Wright* v. *Marquis of Zetland*. (3) There is no evidence in the present case indicating that the local authority has acted in a corrupt manner.

Clauson K.C. in reply. On the undisputed facts and correspondence this case calls, at least, for explanation. It is a question of fact whether the policy of the local authority was an educational or a social policy. It was obviously not an educational policy, and the notice of dismissal is consequently invalid and inoperative.

Cur. adv. vult.

July 31. ROMER J. [after stating the nature of the case continued:] In her statement of claim the plaintiff alleges that the defendants are attempting to dismiss her in pursuance of motives alien and irrelevant to the discharge of their duties as a Local Education Authority. If this allegation be well founded, it is not disputed that the plaintiff is entitled

(1) [1910] 2 K. B. 165. (2) (1874) L. R. 18 Eq. 28.
(3) [1908] 1 K. B. 63.

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to the relief that she seeks in view of the judgment of Eve J. in the case of *Price* v. *Rhondda Urban Council* (1), a judgment that is accepted by both parties as correctly enunciating the principles applicable to such a case as the present one. In that case the plaintiff was a married woman teacher in a public elementary school situate in the district of which the defendant Council was the Education Authority. On July 7, 1922, the Education Committee of the defendant Council passed a resolution that having regard to the large number of certificated teachers who would complete their course of training in the month of July without any prospect of securing employment, the Authority took into consideration the advisability of terminating the engagements of all married women teachers other than those "then in the employ of the Authority on compassionate grounds," and the Director of Education was authorized to give all the married women teachers thereby affected notice terminating their engagements on October 31, 1922. The resolution having been duly confirmed by the defendant Council, notices were in due course given by the Director to the plaintiff and others. The plaintiff thereupon instituted an action claiming that the notices were invalid on various grounds. Eve J. came to the conclusion that the notices were not invalid on any of the grounds suggested. But in the course of his judgment he expressed himself as follows: "The first objection taken to this resolution is that it is not founded on any considerations relevant to the statutory duties and powers of the Authority in that it is directly and solely prompted by a desire to put an end to unemployment without any reference to the question whether the method adopted for so doing would or would not benefit the schools, the support, maintenance and efficiency of which is the primary duty of the Authority. Argument has been addressed to me on the question whether the Authority in engaging and dismissing its employees is to be regarded as acting in a fiduciary capacity, but I do not think it necessary to deal fully with these arguments, because in my opinion it is sufficient to point out that this body,

(1) [1923] 2 Ch. 372, 389, 391.

being a statutory body entrusted with statutory powers, can only exercise those powers for the purpose and with the object of giving effect to the statutory duties imposed upon it, and as one must assume that in dismissing employees or in doing any other administrative act or adopting any particular policy consistent with the powers conferred upon it it acts in good faith, it lies upon those who assert the contrary to establish the truth of that assertion if they can. Had the Council passed this resolution without any introductory words, the plaintiffs would not have had anything in the recorded proceedings suggesting any other motive for the course adopted than that of discharging the statutory duty of maintaining efficiency in the schools, and they could not have succeeded in impugning the validity of the resolutions unless they could have proved that they were ultra vires of the Authority or had been passed corruptly, by which is meant not in good faith with the intent to keep the schools efficient but for some other alien or irrelevant purpose. But the plaintiffs are not left in this difficulty, because the Authority has prefaced the resolution with an introduction indicating its reasons, and having so done has left it open for the plaintiffs to urge, as they do urge, that such reasons are not only insufficient to justify the resolutions but demonstrate that they were passed for some motive other than a desire to maintain the efficiency of the schools. No doubt if no reasons be given, it rests with those who attack the action of the statutory body to prove that such action is ultra vires or corrupt in the sense which I have already indicated, but when reasons are given it is open to those who lead the attack to impugn the sufficiency of the reasons, and to invite the decision of the Court on the issue thus raised. Taking first the resolution as it stands, ought any tribunal to say that it necessarily involves an abuse by the Authority of its powers ? " Then the learned judge dealt with the particular resolution in that case and came to the conclusion that the Education Authority there were acting within their statutory powers and for statutory purposes. Then he says : " It is not for me to express any opinion upon that conclusion ; all

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I have to do is to decide whether or not the Authority acted honestly and within their powers in reaching it. I think they did."

I proceed, therefore, to examine the facts of this case to ascertain whether the plaintiff has shown that the defendants have not acted in good faith with the intent to keep their schools efficient, but for some other alien or irrelevant purpose.

The only parol evidence in the case was that given by the plaintiff herself. No member or officer of the defendant Authority was called on their behalf. In endeavouring, therefore, to ascertain whether the defendants in terminating the plaintiff's engagement were or were not acting for some "alien or irrelevant purpose" I have to rely almost entirely upon the documentary evidence in the case and the inferences that ought properly to be drawn from it.

Now it is admitted that during the whole period of the plaintiff's employment by the defendants she has performed her duties satisfactorily, and that no complaints or adverse reports have been made with respect to her efficiency as a teacher. The only reason for her dismissal is that she is a married woman. She was in fact married on August 6, 1921. Down to this time the defendants do not seem to have given any indication of their having an objection to the employment of married women teachers. But at a meeting of the Education Committee on November 27, 1922, it was resolved that a return should be presented, at the next meeting, of the married women teachers in the Committee's employ. This resolution was confirmed on December 5, 1922, by the Council, and in due course the return was prepared. It appeared from this return that, including the plaintiff, there were seventeen married women then employed in the public elementary schools in the defendants' district, of whom nine were employed in the Council schools and eight in the non-provided schools. The return was submitted to the Education Committee on December 18, 1922, and was referred by them to the Accounts Sub-Committee to consider and report. The return was accordingly considered by the sub-committee at

their meeting on January 16, 1923, with the result that they reported that they were of opinion and recommended that no fresh appointments be made of married women teachers whose husbands were living and capable of supporting them. At a meeting of the Education Committee on January 29, 1923, this report of the sub-committee was adopted. The matter came before the Council as a whole on February 6, 1923, when the report was adopted with the addition of the following words: "And that it be a condition in any future appointment of a woman teacher that in the event of her marriage she shall forthwith resign her teaching engagement." It would appear from this that the Education Committee were not averse from appointing married women in general, but only married women whose husbands were living and capable of supporting them. They did not, therefore, seem to hold the view that a married woman was, by reason of her family and household duties, likely to be a less efficient teacher than one who was free from those ties. I should infer that this was also the view of the Council as a whole. For they adopted the report of the Committee as regards the appointment of women already married, and although in the resolution attaching this condition to any future appointment of an unmarried woman teacher no reference is in terms made to the financial capacity of the husband, it is to be observed that the engagement was not necessarily to determine on marriage. The teacher was merely to resign. Her resignation could of course be either accepted or refused, and I cannot help thinking that the Council were in this way intending to reserve to themselves the power of discriminating between cases where the husband was, and cases where he was not, capable of supporting his wife. From the point of view of maintaining efficient teaching in the schools there would seem to be but little difference between the two cases. Such difference as there may be is in favour of the former class. For as between two husbands, of whom one is capable of maintaining his wife and the other is not, the former would be the one best able to provide his wife with assistance in the discharge of her domestic duties. As a matter of fact the

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plaintiff herself is exceptionally free from ties that might interfere with the discharge of her duties as a teacher. Her husband is in receipt of a salary of 4*l.* a week, and she employs a woman to attend to her domestic concerns. Her mother also lives with her and supervises in the plaintiff's absence. The plaintiff, moreover, has no children. And yet when the plaintiff was interviewed by the town clerk in January, 1923, when he was presumably engaged in preparing the return of married women teachers that the Education Committee had called for, he made no inquiries as to the plaintiff's domestic duties, though he drew attention to the amount of her husband's salary. He did indeed ask if she had any dependents, but stated that if she had it would make her case better.

It does not appear to me that up to this point the defendants or their Education Committee were in any way concerned upon educational grounds with the employment of married women teachers.

So far they had not dealt with the cases of the married women teachers who were already in their service. But this matter engaged their attention in the month of April, 1924. At a meeting held on the 28th of that month, the Education Committee adopted the report of a sub-committee that had been appointed to consider the cases of certain classes of married women teachers. This report, so far as material, is in these terms: "Your Committee beg to report that there are, at present, twenty-two married women teachers employed in the public elementary schools of the Borough, of whom eleven are employed in Council schools and eleven in non-provided schools. After giving the matter careful consideration, your Committee are of opinion that, as a general rule, the retention of married women teachers in the public elementary schools is inadvisable, and they recommend that notice be given to all such married women teachers as are employed in Council schools that their engagement will be terminated in accordance with the terms of their engagement, unless they can satisfy the Committee that some sufficient reason exists for the engagement being continued, and that, unless such

satisfactory reason is given, their engagement will be terminated at the end of three months, and that the managers of the non-provided schools be recommended to take similar action."

The action of the Education Committee as to this report was adopted by the Council on May 6, 1924.

There is nothing in the report of the minutes of the two meetings that clearly indicates the reasons that were actuating the Education Committee or the Council. But it will be observed that the managers of the non-provided schools were to be recommended to take similar action. Seeing that under s. 29, sub-s. 2, of the Education Act, 1921, the Council were entitled to direct the managers to dismiss a teacher on educational grounds, and had power themselves to carry out any such direction if the managers disregarded it, this reference to the managers is somewhat ominous.

It will also be observed that the Committee reserved to itself the right to continue the employment of married women teachers who could give some satisfactory reason for this being done.

Now if the objection to the continued employment of married women teachers was really entertained for reasons connected with the proper discharge by the defendants of their statutory duties as the Education Authority, one would expect to find some indication of this when they came to consider the reasons urged by the several married women teachers in favour of their engagements being continued. These reasons were submitted in response to a letter dated May 16, 1924, addressed to each married woman teacher employed in the Council schools. The letter was in the terms following: "Dear Madam, I beg to inform you that the question of the desirability of continuing the employment of married female teachers now serving in the public elementary schools in the Borough has been considered, and, on the recommendation of the Education Committee, the Council have resolved to give to such teachers the notice required to terminate their engagement, unless they can satisfy the Committee that some sufficient reason exists for the

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engagement being continued, and that, unless such satisfactory reason is given, the engagement will be terminated at the end of three months. If, therefore, you desire to urge any reasons, will you please address the same to me in writing, so that I may submit them to the Committee. This letter is not, of course, a formal notice to terminate your engagement, which notice will be given, if so decided, at a later date. Yours faithfully, Charles Lisby, Town Clerk." To this letter the plaintiff replied on May 20, 1924, stating, amongst other things, that she had no domestic ties, nothing to hinder her in the smallest sense, and that she employed help in the house that she might give her whole and undivided attention to the work. Replies were also received from or on behalf of several of the others. All these replies appear to have been brought before the Education Committee on June 23, 1924. The following is an extract from the minutes of the Committee of that date: "The Committee considered representations made by certain married women teachers in Council schools, giving reasons why their engagement should not be terminated, and the several cases were dealt with on their merits."

The town clerk kept a note of the recommendations made by the Committee at this meeting and these recommendations were subsequently adopted by the Council. It would appear from this note that the plaintiff's reasons were not considered to be sufficient to justify her retention, and it was decided that she should be given notice to determine her engagement. In the case of two others, however—namely, a Mrs. Saunders and a Mrs. Fance, it was considered desirable to ask for further particulars, and it is interesting to see what was the nature of the further particulars that the Committee desired. The letter of the town clerk to the Rev. E. Hounslow, who had made an appeal on behalf of Mrs. Saunders, was as follows: "25th June, 1924. I brought your letter of the 20th ultimo before the Education Committee at their meeting on Monday when they thought if Mrs. Saunders desired to make any representations for her services to be retained she might have made them direct. The Committee would not arrive

at a decision in the absence of some information respecting the financial position of herself and her husband, and if it is desired that the Committee should further consider her case it would be advisable that this information be sent to me as soon as possible. Yours faithfully, Charles Lisby, Town Clerk." The reply to Mrs. Fance was in these terms: "25th June, 1924. Dear Madam, I brought your letter of the 18th ultimo before the Education Committee at their meeting but before arriving at a decision they wish to be supplied with further particulars respecting your circumstances. Please let me know what your husband's salary is and whether you have any other source of income than such salary. Yours faithfully, Charles Lisby, Town Clerk."

I cannot understand what the Education Committee or the Council had to do with the financial position of the teachers and their husbands. If the Committee and the Council were really of opinion that the best interests of education in their district demanded that married women teachers should no longer be employed, the amount of the husband's salary or of the teacher's income from outside sources was surely an irrelevant consideration, except in so far as it might be a reason for discriminating in favour of those who had the larger incomes. If any particular class of married women teachers, such as those whose husbands are incapable of supporting them, are to be retained in their employment, it is impossible to suppose that the defendants consider this to be opposed to the best interests of education. If that be so, the defendants would seem to have had some object in view other than the discharging of their statutory duties in the most efficient way, when they determined to dismiss married women teachers whose husbands were in a better financial position.

This conclusion is much supported by a letter dated May 19, 1924, and written by the town clerk to the several managers of the non-provided schools in the defendants' district. After stating the conclusion to which the Education Committee had come on April 28, 1924, as to the continuance of married women teachers in the Council schools, the letter continues

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in these words: "The Committee were led to this decision for the following reasons viz.— (1.) They consider the duty of the married woman is primarily to look after her domestic concerns and they regard it as impossible for her to do so and to effectively and satisfactorily act as a teacher at the same time. (2.) That it is unfair to the large number of unmarried teachers who are at present seeking situations that the positions should be occupied by married women who presumably have husbands capable of maintaining them. With regard to teachers engaged in non-provided schools it appears that the right to terminate the engagement rests with the managers, and it is doubtful whether the Local Education Authority, in relation to such teachers, are in a position to direct the managers to act in accordance with the decision above referred to with regard to teachers in Council schools, but they instruct me to express the hope that the managers will take the same view of the circumstances as both the Education Committee and the Council have done and will, with regard to the married women teachers in their school, take similar action."

In my opinion this letter strongly suggests that the object which the Committee and the Council had in view was to remove so far as possible any inducement to married women teachers to neglect their domestic concerns, both because it was, in the view of the Committee and the Council, the primary duty of married women to attend to those concerns, and because the young unmarried female teachers were in greater need of remunerative employment than those who were married. If this were their object it is easy to understand the indulgence extended to those married women teachers whose financial positions were such as to render it desirable that they should continue to earn the means for supporting their families or other dependents. It is also easy to understand why, if this were their object, it was considered doubtful whether the Local Education Authority were in a position to direct the managers to act in accordance with the Committee's decision. For the grounds of dismissal would not be educational grounds. If, on the other hand, the decision

had been come to in the best interests of education, I cannot understand how any doubt could have existed as to the power of the defendants to direct the managers. C. A. 1925 SHORT v. POOLE CORPORATION. Romer J.

As already stated, I have not had the advantage of hearing from any member or official of the Education Authority what were the motives actuating the Committee and the Council in taking the action that they did. That being so I must do the best I can with the materials at my disposal. Doing so, and not forgetting that the onus of proof is on the plaintiff, I find myself driven to the conclusion that, however deserving of sympathy the object that the defendants have in view may be, they are attempting to dismiss the plaintiff in pursuance of motives in no way connected with the efficient maintenance of the schools or of education in their district, but for motives alien and irrelevant to the discharge of their statutory duties.

I must make the declaration that is asked for, and I direct the defendants to pay the plaintiff's costs. J. L. D.

The defendants appealed. The appeal was heard on November 11 and 12, 1925. C. A.

Maugham K.C. and *C. D. Myles* for the appellants. The action of the appellants cannot be challenged unless it is shown that their resolution to dismiss the respondent was passed in bad faith, and even if the appellants have to exercise a wise discretion, into which the Court can inquire, there is no reason for thinking that they have come to a wrong conclusion. The appellants contracted to employ the respondent at pleasure and they can give her notice at pleasure. She challenges the grounds for giving that notice, but they are no part of the contract, sufficient or insufficient as they may be, so long as the appellants acted honestly and in good faith. Either party in the present case can give notice to terminate the contract, and the reason for the notice is immaterial: *Hayman* v. *Governors of Rugby School* (1); *Wright* v. *Marquis of Zetland* (2); *Notley* v. *London County*

(1) L. R. 18 Eq. 28. (2) [1908] 1 K. B. 63.

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Council (1); *Price* v. *Rhondda Urban Council*. (2) The Court is not concerned with the reasons for giving the notice. *Hanson* v. *Radcliffe Urban Council* (3) removes any idea that there was something ominous in the appellants not having ordered the managers of the non-provided schools to dismiss their married teachers, as appears to have been thought by Romer J. (4) The fact that the appellants decided not to carry out their rule in cases of great hardship affords no ground for attacking the rule, which was adopted for the purpose of maintaining and keeping efficient these public elementary schools.

Clauson K.C. and *A. A. Thomas* for the respondent. The ordinary relationship between master and servant is not applicable to a case where the master is a statutory body, and that is why the person employed by a statutory body has a remedy in case of dismissal due to corruption or mala fides. A statutory body cannot act outside the ambit of the statute which sets it up; if it does, the act is ultra vires and a nullity. The honesty of the act is no test, because an act may be honest but ultra vires. Further, the statutory body is vested with a discretionary power, and if it exercises it corruptly or in bad faith then the act is a nullity, and so it will be even if the body considers alien and irrelevant matters: *Price* v. *Rhondda Urban Council*. (5) The fact that the action has arisen from an alien and irrelevant purpose takes it outside the ambit of the statute, with the result that what has been done is ultra vires: *Reg.* v. *St. Pancras Vestry* (6); *Roberts* v. *Hopwood* (7); *Reg.* v. *Governors of Darlington School* (8), cited by Malins V.-C. in *Hayman* v. *Governors of Rugby School* (9); *Rex* v. *Board of Education* (10); *Rex* v. *London County Council* (11); *Sharp* v. *Wakefield* (12); and *Sadler* v. *Sheffield Corporation*. (13) In *Notley* v. *London*

(1) [1915] 3 K. B. 580.
(2) [1923] 2 Ch. 372, 391.
(3) [1922] 2 Ch. 490.
(4) Ante, p. 75.
(5) [1923] 2 Ch. 372.
(6) (1890) 24 Q. B. D. 371.
(7) [1925] A. C. 578.
(8) (1844) 6 Q. B. 682.
(9) L. R. 18 Eq. 28, 72.
(10) [1910] 2 K. B. 165, 178; [1911] A. C. 179.
(11) [1918] 1 K. B. 68.
(12) [1891] A. C. 173, 179.
(13) [1924] 1 Ch. 483.

County Council (1) the question was whether the Council had or had not a discretion to dismiss a servant, not whether that discretion had been properly exercised.

The reasons which led to the decision of the appellants are clearly stated in the letter from the town clerk of May 19. In taking the view that a married woman's place was her home, and that the employment of married women was unfair to the single women teachers, the appellants were travelling outside the ambit of the statute. Both those reasons are collateral matters or objects outside that ambit. The appellants considered the individual instance of the respondent not on the ground of educational efficiency but on the financial ground, and that was not a proper exercise of their discretion or powers.

Maugham K.C. in reply. *Cur. adv. vult.*

Nov. 20. POLLOCK M.R. This is an appeal from the judgment of Romer J. given on July 31, 1925, in an action brought by the present respondent, Mrs. Short, against the appellants, the Mayor, Aldermen and Burgesses of the Borough of Poole, for a declaration that a notice dated July 30, 1924, served on the respondent by or on behalf of the appellants, and purporting to terminate her engagement as an assistant mistress under the appellants as Local Education Authority, is invalid and inoperative, and has not the effect of terminating the said engagement, and that her contract of service with the appellants is still subsisting. Romer J. made the declaration in the above terms, and ordered the appellants to pay the respondent's costs; hence this appeal.

The appellants are, by virtue of s. 3 of the Education Act, 1921, constituted the Local Education Authority within their borough for the purposes of elementary education, and by s. 17 of the same Act they are charged "to maintain and keep efficient all public elementary schools within their area."

By s. 148, sub-s. 1, of the Act, "a local education authority may appoint necessary officers, including teachers, to hold office during the pleasure of the authority, and may assign

(1) [1915] 3 K. B. 580.

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to them such salaries or remuneration (if any) as they think fit, and may remove any of those officers."

As from January 1, 1905, the respondent, then unmarried, was duly appointed certificated assistant teacher of the girls' department of the Branksome Heath Council Elementary School, and in March, 1914, she was appointed assistant mistress in the girls' department of the Heatherlands Council School, Parkstone, Dorset, also a public elementary school provided by the appellants, and continued to hold this latter appointment until the matters hereinafter mentioned. There was, and is, no question that the respondent has performed her duties satisfactorily and is an efficient teacher. On August 6, 1921, the respondent married her husband, Mr. Short. On July 31, 1924, the respondent—in common with certain other married women teachers in the service of the appellants—received a notice from the town clerk of the appellants to terminate her engagement at the expiration of one calendar month from that date, that being the length of notice due.

The question to be determined is whether the appellants had power in the circumstances hereinafter stated to serve that notice, and whether it is operative to terminate the respondent's engagement.

From the terms of s. 148, sub-s. 1, already referred to, it would seem that the appellants' powers are not in any way circumscribed. The teachers are appointed to hold office "during the pleasure of the Authority," who "may remove any of those officers." No question arises in the present case, as might arise in the case of non-provided schools, as to which certain conditions are laid down in s. 29, sub-s. 1, of the Act, which requires the managers of such schools to carry out any directions of the Local Education Authority "for the dismissal of any teacher on educational grounds." Those words were the subject of the decisions in the cases of *Hanson* v. *Radcliffe Urban Council* (1) and *Sadler* v. *Sheffield Corporation*. (2)

No such limitation appears in s. 148, sub-s. 1, and a local authority cannot impose limits upon its powers if the statute

(1) [1922] 2 Ch. 490, 500. (2) [1924] 1 Ch. 483.

has not done so: see *Reg.* v. *Governors of Darlington School.* (1) But it is argued that, however unfettered the powers of the Education Authority are under the words of the section simpliciter, there is evidence in the present case that the appellants were actuated by motives, and pursued aims, wholly outside their province as an Education Authority, so that their action in giving the notice of July 30 was ultra vires, and not warranted as an exercise of their duty or powers.

It appears that the question of the employment of married women as teachers had exercised the minds of the Council of the appellants for some time past, and at the close of 1922 a return had been required, and obtained, of the married women teachers in their employ. On February 6, 1923, the Council adopted the resolution which in its completed form is as follows: "That no fresh appointments be made of married women teachers whose husbands are alive and capable of supporting them; and that it be a condition in any future appointment of a woman teacher that in the event of her marriage she shall forthwith resign her teaching engagement."

On May 6, 1924, the Council adopted the report of their Education Committee, which was as follows: ". . . . your Committee are of opinion that, as a general rule, the retention of married women teachers in the public elementary schools is inadvisable, and they recommend that notice be given to all such married women teachers as are employed in Council schools that their engagement will be terminated in accordance with the terms of their engagement, unless they can satisfy the Committee that some sufficient reason exists for the engagement being continued, and that unless such satisfactory reason is given, their engagement will be terminated at the end of three months, and that the managers of the non-provided schools be recommended to take similar action."

The particular circumstances relating to the married women teachers then employed by the Council—including the respondent—were thereafter considered as foreshadowed in

(1) 6 Q. B. 682, 717.

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the above report; but no sufficient reason was found in her case to satisfy the Education Committee or Council that her engagement should be continued, and thus on July 1, 1924, the Council decided that notice to determine her engagement should be given. Accordingly it was given on July 30, 1924, and received by the respondent, as already stated. The writ in this action was thereupon issued on August 19, 1924.

At the trial counsel for the respondent put in evidence a letter written to the managers of the non-provided schools, dated May 19, in pursuance of the decision of the Council of May 6 already stated. As this letter is relied upon as containing the evidence for the respondent at its high-water mark, I set it out in full: "Town Clerk's Office, Poole, 19th May, 1924. Dear Sir, Married Women Teachers. The Education Committee have had under consideration the desirability of continuing the employment, in the public elementary schools in the Borough, of married women teachers, and they have decided that, so far as the Council schools are concerned, the engagement of all such teachers will be terminated unless in any particular case some sufficient reason exists for the engagement being continued, and that unless a satisfactory reason is given, the engagement will be terminated at the end of three months. The Committee were led to this decision for the following reasons: (1.) They consider the duty of the married woman is primarily to look after her domestic concerns and they regard it as impossible for her to do so and to effectively and satisfactorily act as a teacher at the same time; (2.) That it is unfair to the large number of young unmarried teachers who are at present seeking situations that the positions should be occupied by married women, who presumably have husbands capable of maintaining them. With regard to teachers engaged in non-provided schools, it appears that the right to terminate the engagement rests with the Managers, and it is doubtful whether the Local Education Authority, in relation to such teachers, are in a position to direct Managers to act in accordance with the decision above referred to with regard to teachers in Council schools; but they instruct me to

express the hope that the Managers will take the same view of the circumstances as both the Education Committee and the Council have done, and will, with regard to the married women teachers in their schools, take similar action."

The appellants do not contest the proposition that where an authority is constituted under statute to carry out statutory powers with which it is entrusted, there are cases which show that if an attempt is made to exercise those powers corruptly—as under the influence of bribery, or mala fide—for some improper purpose, such an attempt must fail. It is null and void: see *Reg.* v. *Governors of Darlington School*. (1) So also of attempts to act ultra vires: see *Rex* v. *Board of Education*. (2) But these same cases indicate that where the tribunal has exercised the discretion entrusted to it bona fide, not arbitrarily or illegally, the Courts cannot interfere. No doubt, where a discretion is given to justices or other local bodies, it must be exercised and not refused: see *Reg.* v. *Adamson* (3); *Reg.* v. *Vestry of St. Pancras* (4); and *Rex* v. *London County Council*. (5) But where it is exercised the Courts are slow to interpret their action as invalid, as explained by Lord Russell of Killowen C.J. in *Kruse* v. *Johnson*. (6)

The appellants contend, first, that, except as above—that is, when corruption or mala fides is proved, or the act is ultra vires—the action of the Council in giving notice to determine the contract cannot be challenged, and, secondly, that on the facts of the present case there is no such proof established. On the contrary, they claim that the Council acted strictly with a view to educational ends.

To this it is answered that in the present case the Council made a broad rule not to employ married women as teachers, and if and so far as they examined individual cases they did so, as in the case of the respondent, to ascertain what were the economic conditions of the teacher's home—how far her husband could, and did, support her; and they came to their decision to send the notice of July 30 on these grounds

(1) 6 Q. B. 682, 715.
(2) [1910] 2 K. B. 165.
(3) (1875) 1 Q. B. D. 201.
(4) 24 Q. B. D. 371.
(5) [1918] 1 K. B. 68.
(6) [1898] 2 Q. B. 91, 99, 100.

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and not upon consideration of the fitness of the married woman to act as a teacher, or her competence to continue her educational work.

The evidence, and particularly the letter of May 19, do not, in my judgment, found a basis for this argument. It is clear that the Council were considering the desirability of continuing the employment of married women teachers, and the two reasons set out later in the letter deal with her effectiveness as a teacher and the problem of securing a due supply of teachers necessary to fill the gaps caused by time and wastage. The letter is to be read fairly without any sinister bias, and, so read, the first reason appears to me to refer to the incidence of domestic duties which may be presumed to fall with greater weight upon a married woman than upon a single woman; and the second reason appears to me to refer to the problem, always an anxious one, whether a due succession and supply of teachers can be obtained and is likely to be maintained, or whether the zeal of intending applicants will be dissipated by long delay and consequent abandonment of the teaching profession. At the least, this is a possible interpretation of the letter. It is not suggested that the Council acted otherwise than with bona fides; and if the interpretation of the letter and of the conduct of the Council, as explained therein, is doubtful, it is not right to exclude the view that I have expressed in weighing the evidence placed before the Court. If the effect of the evidence be such as I hold it is, there is no proof that the Council have taken into account matters other than those which belong to their educational sphere. I agree that if the evidence led to a different conclusion, the Council could not cure the mischief of their adherence to a general rule, not of educational import, by reference to the domestic position and concerns of particular teachers.

The true view, however, is in my judgment that the Council dealt with the matter from an educational standpoint: and the inquiries made in the individual cases were made only to see if it were possible, on balancing the advantages and disadvantages, to mitigate the hardship even if at some

sacrifice of educational efficiency. The fact that their decision was communicated to the non-provided schools in the terms used in the letter does not justify a sinister interpretation being put upon it.

It is necessary to add a few words about the cases, because it is said that in some of them alien or irrelevant or collateral or extraneous grounds are treated as equivalent to, or evidence of, the fact that a public body has misused its powers, and that such conduct is proved in the present case.

Such words are to be found in *Hayman* v. *Governors of Rugby School* (1) and *Rex* v. *Board of Education* (2), and other cases cited to us. Lord Sumner dealt with them in *Roberts* v. *Hopwood* (3) in quoting Lord Cranworth's observations in *Stockton and Darlington Ry. Co.* v. *Brown.* (4) Lord Cranworth's words are: "provided only that they take them," the lands, "bona fide with the object of using them for the purposes authorized by the legislature, and not for any sinister or collateral purpose." It is clear that Lord Cranworth uses the words in contrast to what is authorized by the Legislature, and Lord Sumner so interprets them in his application of them to the case before him, when he held the action questioned to fall outside the realm of discretion.

It may be well to quote the words of Lord Russell of Killowen C.J. in his judgment in *Kruse* v. *Johnson* (5), already cited, where he was considering by what test the question whether certain by-laws were unreasonable or not was to be decided. He says: "But unreasonable in what sense? If, for instance, they were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say, 'Parliament never intended to give authority to make such

(1) L. R. 18 Eq. 28, 85.
(2) [1910] 2 K. B. 165, 179.
(3) [1925] A. C. 578, 606.
(4) (1860) 9 H. L. C. 246, 256.
(5) [1898] 2 Q. B. 91, 99.

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rules; they are unreasonable and ultra vires.' But it is in this sense, and in this sense only, as I conceive, that the question of unreasonableness can properly be regarded." I do not find any case where "collateral or alien" has been held to be a test of action which falls rightly within the discretion of the authority and has been bona fide exercised.

It may well be that some expressions of opinion may be given in a Council chamber, which to some members present, or to many outside, may appear collateral or alien to the matter discussed. But, as Lord Sumner adds: "There are many matters which the Courts are indisposed to question. Though they are the ultimate judges of what is lawful and what is unlawful to borough councils, they often accept the decision of the local authority simply because they are themselves ill equipped to weigh the merits of one solution of a practical question as against another."

Where a discretion is given to the local authority, it is for that authority to exercise it, provided that its action is not ultra vires, nor its powers exercised corruptly or mala fide. Where the exercise of the discretion is challenged, it is for the plaintiff to prove that there is a duty in the Courts to interfere upon the grounds already stated. In my judgment no such proof has been established in the present case. The authority may appear to be right or may appear to be wrong in the course they have adopted, according as that course may be subjected to criticism from one point of view or another. Upon such discussion and criticism it is not for the Courts to pronounce. So long as the discretion has been exercised and the limits of discretion are not passed, the decision rests with the local authority.

In my judgment the plaintiff has failed to make out a case for the interference of the Courts. The appeal will be allowed with costs here and below.

WARRINGTON L.J. The question in this appeal from a judgment of Romer J. is whether a notice terminating the engagement of the plaintiff as an assistant mistress under the defendants as the Local Education Authority of the

Borough of Poole is valid and operative, and had the effect of terminating her engagement.

The learned judge has held that the notice is invalid and inoperative, and that the engagement of the plaintiff is still subsisting. The defendants appeal.

The plaintiff is a married woman living with her husband, and the notice was given in pursuance of a resolution of the defendant Corporation adopting a report of their Education Committee to the effect that as a general rule the retention of married women teachers in the public elementary schools is inadvisable. The case is an important one, raising, as it does, the question which has been much discussed as to the employment of married women as teachers in public elementary schools, and the power of Local Education Authorities to determine and act on a definite policy in that respect.

Under the Education Act, 1921, the defendants, the Mayor, Aldermen and Burgesses of the Borough of Poole, are the Local Education Authority for that borough. The school at which the plaintiff was employed is a provided school within the borough. The defendants had an Education Committee duly constituted in accordance with the Act.

The duty of the Local Education Authority under s. 17 of the Act is that they shall in accordance with the provisions of the Act maintain and keep efficient all public elementary schools within their area. No detailed directions are given by the Act as to the mode in which this duty is to be performed, except in regard to matters which are quite immaterial to the present question.

It is provided by s. 148, sub-s. 1, that a Local Education Authority may appoint necessary officers, including teachers, to hold office during the pleasure of the Authority, and may assign to them such salaries or remuneration (if any) as they may think fit, and may remove any of those officers.

Under the regulations made by the Authority through the Education Committee the plaintiff is entitled to a month's notice to terminate her engagement.

The plaintiff was appointed a teacher in the school in question in 1914, and it is admitted that she has performed

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her duties satisfactorily, and no complaints or adverse reports have been made with respect to her efficiency as a teacher. She married her present husband in 1921. She has no children.

On the other hand, it is admitted that the notice terminating her engagement was given bona fide, and that there is no irregularity in the notice itself or in its service on the plaintiff, or in the proceedings of the Council or its Education Committee in relation thereto.

The learned judge came to the conclusion that the defendants were attempting to dismiss the plaintiff in pursuance of motives in no way connected with the efficient maintenance of the school or of education in their district, but for motives alien and irrelevant to the discharge of their statutory duties, and on this ground declared the notice invalid and inoperative. Was he justified on these grounds? No others are suggested in pronouncing the judgment appealed from.

In the case of an individual employer under a contract with an employee, such as existed in the present case, the motives of the employer in giving the notice would be wholly immaterial, and provided the notice in itself complied with the terms of the contract the employment would be duly determined by it.

Is the position of a public body, such as the defendants in the present case, in any, and, if so, in what respect different from that of an individual? In my opinion it is different only in this, that being established by statute for certain limited purposes, no act purporting to be that of the public body can have any operation as such, if the individuals purporting to exercise the functions of the public body have, in performing the act in question, transcended the limits of the authority conferred upon it. If they have done so, and this fact is proved affirmatively by the person who complains of their action and seeks to have it declared invalid and inoperative, then, and then only, has the Court, in my opinion, jurisdiction to interfere.

Thus no public body can be regarded as having statutory authority to act in bad faith or from corrupt motives, and

any action purporting to be that of the body, but proved to be committed in bad faith or from corrupt motives, would certainly be held to be inoperative.

It may be also possible to prove that an act of the public body, though performed in good faith and without the taint of corruption, was so clearly founded on alien and irrelevant grounds as to be outside the authority conferred upon the body, and therefore inoperative. It is difficult to suggest any act which would be held ultra vires under this head, though performed bona fide. To look for one example germane to the present case, I suppose that if the defendants were to dismiss a teacher because she had red hair, or for some equally frivolous and foolish reason, the Court would declare the attempted dismissal to be void.

My view then is that the only case in which the Court can interfere with an act of a public body which is, on the face of it, regular and within its powers, is when it is proved to be in fact ultra vires, and that the references in the judgments in the several cases cited in argument to bad faith, corruption, alien and irrelevant motives, collateral and indirect objects, and so forth, are merely intended when properly understood as examples of matters which if proved to exist might establish the ultra vires character of the act in question.

It is remarkable that in not one of the cases cited in argument in which questions really like those in the present have been raised, has the Court thought fit to interfere.

I now turn to the facts of the present case. There can be no question that the notice to the plaintiff was given in accordance with the opinion of the defendant Authority arrived at after careful consideration, that it is as a general rule inadvisable to retain married women as teachers in the public elementary schools. I can see nothing in this view alien or irrelevant to the making and keeping efficient the public elementary schools. I do not know, and if I did I should have no right to criticize favourably or unfavourably, the arguments on which such an opinion was formed. With the question whether a particular policy is wise or foolish the Court is not concerned; it can only interfere if to pursue

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it is beyond the powers of the Authority. Dealing with the present matter from this point of view, a determination to employ as far as possible women who are devoting their lives and energies entirely to the business of teaching without assuming the privilege and the burden of domestic ties, cannot in my judgment be irrelevant to the maintenance of the efficiency of the schools or the course of education in the district. So also if the adoption of the policy in question resulted from a desire that single women might be encouraged to undergo training with a fair hope of employment, it would not, as I think, be irrelevant to the question of efficiency or to the cause of education.

Unless, therefore, some positive fact has been proved from which it may be inferred that what, on the face of it and on the avowed motives of the defendants, appears to have been properly done was really outside the powers of the defendants, I should be of opinion that the appeal ought to succeed. Has any such fact been proved ? In my opinion it has not. The plaintiff and the learned judge lay stress on the fact that the defendants have in some cases, and particularly where the woman was the pecuniary mainstay of her household, abstained from acting on their general resolution. In my opinion the facts in this respect only amount to this, that the defendants, while seeking, as an ideal to attain to, the exclusive employment of single women, have abstained from giving effect to their views in cases in which grievous hardship would be caused. I cannot see how this concession can affect their action in other cases in which they considered that their object could fairly be attained.

But, in truth, there is no evidence beyond that contained in the report of the Education Committee, adopted by the Council, of the motives of the latter in adopting the course they pursued. Unless such motives are expressed in a resolution or can be inferred from the nature of the policy itself, I see great difficulty in seeing how they are to be ascertained so as to afford a ground for interference by the Court. Certainly the reasons for the views of the Education Committee as expressed in the letter of the town clerk cannot be

accepted as those of the Council as a whole. But even if this letter be accepted as evidence of the Council's motives, I can see nothing in them alien or irrelevant to the matters which it was their duty to consider. With all respect to the learned judge, I think he has dealt with the matter from too restricted a point of view. He has, I think, regarded the province of the defendants as concerned only with the efficiency of a particular teacher and a particular school; whereas in my opinion it is clearly their duty and within their province to consider whether a certain policy will or will not be a benefit to the cause of education generally in their district.

On the whole, I think the judgment of the learned judge was erroneous and ought to be reversed and the action dismissed with costs here and below.

SARGANT L.J. In order to succeed here the plaintiff obviously had a heavy load to discharge. Under the statute creating the defendants the Local Education Authority for their district, all teachers appointed by them were to hold office during the defendants' pleasure. The plaintiff was appointed on these terms, and has received a notice terminating her engagement in accordance with her contract. It is therefore necessary for her to establish that this notice was a nullity, and accordingly that her engagement is still in existence. Nothing short of this can avail her.

It is clear that the termination of the plaintiff's engagement is due not to any individual default on her part, but solely to the adoption by the defendants of a general policy against the employment of married women teachers; and the question therefore arises whether, in adopting this general policy, the defendants have so conducted themselves that the Court is justified in holding their action outside the limits of their authority, and therefore null and void.

In determining this question it is vital to bear in mind that when the charge of elementary education in particular districts is entrusted by Parliament to local authorities in those districts, and especially to popularly elected authorities, a very wide discretion is necessarily vested in them; and it

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must have been contemplated that a considerable diversity would arise in the methods adopted by different authorities in the course of carrying out their duties. Further, the normal critics of these methods would be not the Courts, but the body of electors by whom the local authorities had been chosen and to whom they would ultimately have to render an account of their stewardship. Nevertheless, there are certain cases in which it is admitted that the assistance of the Courts may properly be invoked. If it were proved that the local authority had acted corruptly or mala fide, that is, for a purpose other than that for which their powers were entrusted to them, then the Courts would be entitled, and indeed bound, to hold that the action so taken was outside their statutory powers, and was void. And it may be, though it is difficult to imagine an example, that the action of a local authority was on the face of it so frivolous, arbitrary, or vexatious, that the Court would infer mala fides. But I doubt whether there is any other case in which the Courts would interfere. There has not, I think, been interference in any decided case in which there has not been corruption, mala fides, or a clear excess of authority.

A mere decision to discontinue the employment of married women teachers, or of any women teachers at all, or a decision to employ women teachers only, could not, in my judgment, be interfered with by the Courts, however mistaken such a decision might appear to be. It is quite conceivable that the majority of a popularly elected body might genuinely consider that such a policy was beneficial. It would be for the electors, if they thought fit, to alter the policy by changing their representatives at the next election. This general proposition was not, I think, seriously contested by counsel for the respondent. Their argument was mainly, if not entirely, devoted to proving that the appellants had in fact acted not for the purpose of carrying out their duties as the education authority, but for a different purpose or purposes, such as, for instance, to secure that married women should devote their full energies to their domestic duties, or to prevent married women whose husbands were capable of supporting

them from competing in the educational market. And to prove that the real purpose of the appellants was something other than the due discharge of their educational duties the respondent's counsel relied on two facts or circumstances—namely, first a letter from the town clerk to the managers of non-provided schools in the district, and secondly the inquiries made by or by the direction of the appellants in the course of ascertaining whether exceptions to the general rule of dismissal should be made in certain cases of special hardship.

The town clerk's letter does not purport to represent the views of any one but the Education Committee, and cannot, I think, be held to bind even the members of that Committee. Still less can it be taken to reflect accurately the reasons which actuated the general body of the Council of the Corporation. It cannot be properly used against the appellants as being of the nature of an admission. But even if this were the case, it does not in my judgment indicate, still less prove, that the appellants acted mala fide or for purposes foreign to their duties.

Then how does the matter stand as regards the inquiries made as to cases of special hardship? Because a number of particulars were sought for in order to ascertain whether certain teachers shall be excepted from the general rule, it is argued that the nature of the particulars demanded indicates the reasons for which the general rule was adopted. This argument is quite unconvincing. A general rule may be perfectly sound, and yet reasons entirely unconnected with the adoption of the general rule may render it inexpedient to apply it forthwith in a particular case where it would cause very special hardship. Indeed, to apply it without any discrimination might strongly prejudice the educational reputation of the appellants and diminish their prospects of obtaining suitable teachers in the future. The course which the appellants have pursued in this last respect is, in my judgment, a thoroughly reasonable one, and affords no indication at all of mala fides or disregard of their duties towards education.

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It is notoriously difficult to establish the state of a person's mind, though this may sometimes be done, as in such cases as that of *Edgington* v. *Fitzmaurice*. (1) And the difficulty is increased when it is sought to prove that a public body, apparently acting in the legitimate exercise of their duty and within the ambit of their powers, have in fact been acting mala fide in the sense of pursuing an illegitimate aim.

In my judgment the respondent has failed to overcome this difficulty, and this appeal should be allowed.

Appeal allowed.

Solicitors for the appellants: *Peacock & Goddard, for W. H. Curtis, Poole.*

Solicitor for respondent: *Eric G. Floyd.*

R. M.

ASTBURY J. 1925 *Nov.* 19.

In re TURTON.

WHITTINGTON *v.* TURTON.

[1925. T. 1478.]

Will—Condition Precedent—Conditional specific Devise—Condition rendered impossible by Testator.

By his will of 1906 a coal merchant devised and bequeathed his freehold coal wharf, where his business was carried on, and also his coal business, to his trustees upon trust to carry on the business until the younger of two named nephews attained 25, on which event he directed his trustees to hand over to them the business, which he desired the nephews to carry on in copartnership, and if they so carried on the business for five years to the satisfaction of his trustees, then he directed his trustees to convey his said freehold coal wharf to them in equal shares as tenants in common, to whom he devised the same absolutely. But if the business was not carried on by the nephews for five years to the satisfaction of his trustees, he directed his trustees to hold his coal wharf as part of his residuary estate, which was otherwise disposed of.

In 1912 the testator gave up his business, in which the two nephews, though of age, were not employed, and sold his stock in trade. He,

(1) (1885) 29 Ch. D. 459.

however, retained the wharf until his death in 1925, having let it to tenants who used it for a different business.

The wharf was now claimed by the two nephews on the ground that the condition precedent having been rendered impossible by the testator's own act was discharged, and the specific devise took effect:—

Held, that on the construction of the will and in the events that had happened, the wharf fell into residue.

Semble, the ratio decidendi of *Darley* v. *Langworthy* (1774) 3 Bro. P. C. 359; *Gath* v. *Burton* (1839) 1 Beav. 478; and *Walker* v. *Walker* (1860) 2 D. F. & J. 255 to the effect that a condition precedent, which becomes impossible by the act of the testator, is discharged, is confined to personalty and does not apply to real estate.

ORIGINATING SUMMONS.

By his will dated July 23, 1906, the testator, a coal merchant, after appointing his brother, G. W. Turton (who predeceased him), his nephew, the defendant, Alan Fillingham, and the plaintiff, G. Whittington, his executors and trustees, and making some specific and pecuniary bequests and a specific devise, devised and bequeathed "my freehold coal wharf situate at Crown Point in the City of Leeds where my business is carried on, And also all the machinery plant fixtures boats horses wagons carts implements utensils stock in trade effects goodwill book and other debts and the capital money used or employed in my said business" to his trustees "upon trust to carry on my said business until the youngest of my nephews John Turton and the said Alan Fillingham shall attain the age of 25 years or the survivor of them attains that age or dies under that age." He then directed his trustees to employ a competent manager and such other persons, including his said two nephews, as they might consider necessary at such salaries as they might determine. The net profits were to be invested and accumulated until the younger nephew or the survivor attained 25 or until the survivor died under that age, with power to resort to the accumulations if additional capital was required, or if the profits were insufficient for carrying on the business.

"And on the younger of my said two nephews attaining 25 years of age (they being both then living) I direct my trustees to hand over to them my said business of a coal merchant and all the machinery plant fixtures boats horses

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wagons carts implements utensils stock in trade effects goodwill book and other debts and the capital money used or employed in such business which I desire my said two nephews to carry on in copartnership And if they shall so carry on my said business for a period of 5 years to the satisfaction of my trustees (G. W. Turton and G. Whittington) or the survivor of them then I direct my trustees to convey my said freehold coal wharf to them in equal shares as tenants in common to whom I devise the same absolutely And to transfer assign and hand over to them any investments of profits and income of investments then in their hands to whom I give and bequeath the same in equal shares. But in the event of either of my said nephews departing this life before the younger of them shall have attained the age of 25 years, then I give devise and bequeath my said coal wharf and my said business and everything connected therewith and also any such investments as aforesaid to the survivor of them my said two nephews absolutely conditional upon his carrying on such business for a period of 5 years as aforesaid, But in the event of such business not being carried on by my said nephews or nephew as the case may be for a period of 5 years to the satisfaction of my trustees the said G. W. Turton and G. Whittington or the survivor of them I direct my trustees to hold my said coal wharf as part of my residuary estate and to deal with it accordingly." The testator then devised and bequeathed his residuary real and personal estate to his trustees upon trust for sale and conversion and directed them to hold the proceeds upon trust for certain residuary legatees, including the two nephews.

At the date of his will, 1906, the testator was carrying on business as a coal merchant, and used his freehold wharf in connection therewith. In 1912 he discontinued his business, in which the two nephews, though of full age, were not employed, and sold the vehicles and effects thereof. He retained however his freehold wharf until his death, having let it to tenants who used it for a different sort of business.

The testator died on January 22, 1925, and on March 31,

1925, his will was proved by the plaintiff and the defendant nephew Alan Fillingham.

On September 21, 1925, the plaintiff issued this summons to determine whether upon the true construction of the will and in the events that had happened the freehold coal wharf passed to the two nephews as specific devisees or whether it formed part of the residuary estate.

Attwater for the plaintiff, the neutral executor-trustee.

G. R. B. Whitehead for the two nephews, the specific devisees. Performance of a condition precedent is excused if it is made impossible by the act or default of the testator: Jarman on Wills, 6th ed., p. 1481; *Darley* v. *Langworthy*. (1) That was a personalty case, but there is no reason why the principle should be limited to personalty, and Jarman does not so limit it.

Robert Peel for the residuary legatees, other than the two nephews. The principle is limited to personalty: Theobald on Wills, 7th ed., p. 569. In the case of land the rule is absolute that a devise of land upon a void condition precedent is itself void. That is the common law. It was only in the case of personalty that the equity Courts were able to follow the civil law and apply other principles: see Jarman on Wills, 6th ed., p. 1469; Co. Litt. 206*a* (2); Sheppard's Touchstone, 7th ed. (1820), p. 133.

Apart from any rule, it is clear on this will that the devise of the wharf was subsidiary to the bequest of the business, and conditional on the continuance of that business by the nephews, which was the sole motive of the specific devise. If not so continued there is a clear devise to residue.

Whitehead in reply. The main rule as to impossible conditions precedent is clear; but there is no conceivable reason why the exception in the case of the impossibility arising from the testator's own act should be limited to personalty. (3)

(1) 3 Bro. P. C. 359.

(2) See also 218*a*.

(3) See Sheppard's Touchstone, p. 133, passage in square brackets at end of "Conditions impossible" paragraph; Cruise's Digest, 4th ed., vol. ii., p. 27, Tit. 13, Cap. 2, s. 21.

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If it applies to realty the condition is discharged and the devise good.

As to construction. In the case of personalty the motive of a conditional bequest may be relevant. In the case of a devise of realty it is surely irrelevant. In the present case no doubt the testator intended the business and the wharf to go together, and made a separate bequest and conditional devise accordingly. He then adeemed the bequest of the business, but left the devise of the wharf standing with the condition precedent thereby rendered impossible and therefore discharged. Why should this devise not take effect ?

ASTBURY J. This is a summons to determine whether upon the true construction of the testator's will and in the events that have happened the freehold coal wharf where the testator carried on his business passed to the two nephews as specific devisees or whether it formed part of his residuary estate. That depends first on the true effect of the condition precedent being rendered impossible by the testator's own act, and secondly on what is the true construction of the will in the events that have happened.

The old rule unquestionably was that where land was devised upon an impossible condition precedent the devise was void. In Co. Litt. 206*a* Lord Coke states : " And so it is in case of a feoffment in fee with a condition subsequent that it (1) is impossible, the state of the feoffee is absolute : but if the condition precedent be impossible, no state or interest shall grow thereupon." In Sheppard's Touchstone (1820), p. 133, referring to impossible conditions, it is stated that " If the condition be subsequent, the condition is void only, and the estate is absolute ; and if the condition be precedent, the condition and the estate both are void ; for an estate can neither commence nor increase upon an impossible condition." In Theobald on Wills, 7th ed., p. 569, it is however stated that " As regards personalty, a condition precedent, which becomes impossible by the act of the

(1) Sic.

testator, is discharged; . . . . *Darley* v. *Langworthy* (1); *Gath* v. *Burton* (2); *Walker* v. *Walker*. (3)"

The real question is whether the ratio decidendi of these decisions ought to be applied to real estate notwithstanding the earlier rule. In each case of course the will itself must be construed. [His Lordship then read the will and stated the facts as to the testator's discontinuance of his business and retention and letting of the wharf, and continued:] The question is whether the two nephews are entitled to the wharf or whether it goes to residue. On the whole I think I ought to construe the will as only devising the wharf to the two nephews if they carry on the testator's business in the manner therein laid down. Otherwise the testator desires it to go to residue. By his own act the testator has made it impossible for the two nephews to carry on his business. He has devised the freehold wharf to them subject to a condition precedent, which by his own act he has made impossible. On the construction of the will as a whole I think he meant that if for any reason whatever, including his own act, the condition was not complied with the wharf should go to residue. There is, therefore, an absolute gift to residue in the events that have happened, the conditional specific gift having failed by the condition becoming impossible, and on the language of the will and the general intention of the testator I am of opinion that in the events that have happened the wharf fell into residue.

Solicitors: *Smiles & Co., for Whittington & Talbot, Leeds.*

(1) 3 Bro. P. C. 359. (2) 1 Beav. 478.
(3) 2 D. F. & J. 255.

G. R. A.

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GREGG *v.* RICHARDS.

[1925. G. 766.]

Conveyance—Right of Way—Right claimed referred to in the Habendum but not in the Parcels—Privilege enjoyed with the Land conveyed—Contrary Intention—Conveyancing Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 6, *sub-ss.* 2, 4.

In the conveyance to the plaintiff of a house and land there was an express grant to her of a way described as coloured green on the plan indorsed on the deed of conveyance. The part coloured green was four feet wide and formed part of a wider roadway. At the time of the conveyance a right of access for vehicles to the house over the whole roadway was enjoyed with the house conveyed. The habendum of the deed provided that the owner of the house conveyed should "hold the same with the benefit of all such easements and privileges in the nature of easements as are now subsisting in respect of the property hereby conveyed." The plaintiff claimed that the right to use the whole width of the roadway for the purpose of access of vehicles to her premises passed to her under her conveyance:—

Held, that as the right claimed was not granted in the premises of the deed it did not pass under the habendum, although if the subject matter of the habendum had been merely incidental to the grant it would have passed by virtue of the grant.

Held, also, that the right claimed did not pass under s. 6 of the Conveyancing Act, 1881, because there was a "contrary intention" expressed in the conveyance. The express grant of a right of way over four feet only of the roadway indicated the intention of the parties that the right to use the rest of the roadway should not pass.

WITNESS ACTION.

The defendant Richards was the owner of a rectangular piece of ground on part of which were five houses fronting on to Gower Street, Willenhall, Stafford, and numbered 12 to 16, inclusive. Gower Street ran north and south, and No. 16 was at the northern end. The grounds of No. 16 ran back for the full depth of the rectangle—namely, 120 feet, but the grounds of Nos. 12 to 15 ran back only 69 feet. At the back of Nos. 12 to 15, and partly at the side of No. 12, there was a yard, belonging at the time of the conveyance to the defendant Richards, access to which for vehicles from Gower Street was through double gates measuring 14 feet wide on the south side of No. 12. There was no defined road, the land being old garden ground. Beside the double gates was a gateway for foot passengers. For a number of years before the date of the conveyance to the plaintiffs the

occupiers of Nos. 12 to 16 had enjoyed a privilege, or quasi-easement, in the shape of access by vehicles to the rear of their premises through the double gates over the way leading into the yard. On May 4, 1923, the defendant Richards conveyed to the plaintiff in fee simple No. 16 Gower Street, "together with the right for the owners and occupiers for the time being of the property hereby conveyed to use jointly with all other persons for the time being entitled to use the same the road or way at the back of the buildings Nos. 12 to 15 Gower Street aforesaid and the way or passage leading into Gower Street and coloured green on the plan indorsed on these presents such owners or occupiers paying a proportionate part of the expense of keeping the said way or passage in repair . . . . to hold the same subject to and with the benefit of all such easements and privileges in the nature of easements as are now subsisting in respect of the property hereby conveyed and the said adjoining property of the vendor." The way coloured green on the plan indicated only a way four feet wide leading from the footway entrance in Gower Street, through the yard for 69 feet, then turning at right angles and running at the back of Nos. 12 to 15, and terminating at the side of No. 16, to which there was access both by gates wide enough to admit a vehicle and by a small gate. On March 20, 1924, the defendant Richards sold to the defendants, A. E. Jenks & Cattel, Ld., Nos. 12 to 15, the yard at the back, and the way leading to the yard from Gower Street. The defendants contended that the plaintiff had only a right of access to the back of No. 16 over the footway coloured green and four feet wide, and erected a fence to prevent access for vehicles from Gower Street. The plaintiff claimed that on the true construction of her conveyance she, as owner of No. 16, had a right of way for vehicles from Gower Street to the back of her premises, and asked for (1.) a declaration accordingly; (2.) alternatively rectification of the said indenture.

G. B. Hurst K.C. and *Bischoff* for the plaintiff. It is submitted that on the true construction of the parcels there

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was granted to the plaintiff, first, the right to use the road or way at the back of Nos. 12 to 15 Gower Street, and secondly, the way or passage leading into Gower Street and coloured green on the plan. Also under the habendum the plaintiff takes the benefit of all privileges in the nature of easements subsisting in respect of No. 16 at the date of the conveyance. One such privilege was the right of access for vehicles through the Gower Street gates to the rear of the premises of No. 16.

Roope Reeve K.C. and *Hodge* for the defendant Richards. The plaintiff alleges that there was some antecedent agreement under which a right of way wider than that mentioned in the conveyance was intended to be given. At the highest the evidence of the plaintiff only goes to show that it was represented to her that she would be able to keep a motor car on her premises. It is submitted that no case for rectification has been made out.

Bennett K.C. and *W. F. Waite* for the defendant company. On the true construction of this conveyance there was only one right of way granted to the plaintiff—namely, that from Gower Street to the back of No. 16 coloured green on the map and four feet wide. If the thing granted is not named in the premises it will not pass though named in the habendum : Shep. Touch. 75 ; Norton on Deeds, 1906 ed., p. 284. Here unless a right to use the road was granted to the plaintiff in the parcels she does not acquire that right, because under the habendum she holds No. 16 with the benefit of all such privileges in the nature of easements as subsisted in respect of No. 16 at the time of the conveyance. A man is bound by his grant, which is found in the premises, and the grant cannot be supplemented by something found in the habendum. Neither will the right of way claimed pass by virtue of s. 6 of the Conveyancing Act, 1881. The substance of s. 6, sub-ss. 2 and 4, is that the conveyance of land having houses upon it operates by virtue of the Act to convey with the land the privileges at the time of the conveyance enjoyed with the land, provided a contrary intention is not expressed in the conveyance. Here, although a contrary intention is not expressed in so many words, there is a strong case for

the application of the maxim expressio unius est exclusio alterius. It is submitted that the express grant to the plaintiff of a right of way only four feet wide over the roadway excludes a right of way over the whole width of that roadway : *Beddington* v. *Atlee*. (1)

G. B. Hurst K.C. in reply. The statement of the law quoted from Norton on Deeds is the general rule, but it never applied to what was only incidental to the grant : Shep. Touch. 76 ; Halsbury's Laws of England, vol. 10, p. 474. Here it is admitted that the right of access for vehicles to No. 16 had been enjoyed for years before the conveyance to the plaintiff, who went into occupation of the land with the right of way attached. The plaintiff also obtained the right of access for vehicles under s. 6 of the Conveyancing Act, 1881. The grant of one particular way and the fact that the draftsman has expressly included that way in the conveyance does not show an intention to exclude all other privileges and easements passing under s. 6 : *Hansford* v. *Jago*. (2) The habendum covers all the privileges and easements subsisting at the time of the conveyance, and that shows that the parties did not intend to cut down the general words of s. 6.

RUSSELL J. In this action the plaintiff seeks to establish that as owner of a house, No. 16 Gower Street, Willenhall, she is entitled to a way for carts and vehicles from Gower Street to the back of her premises at No. 16. She claims this right under the conveyance to her of No. 16 by the defendant Richards, and in the alternative, if the deed of conveyance as it stands does not give that right, she asks for rectification against her vendor.

The parcels are in these terms. [His Lordship read them.] On turning to the plan which forms part of the conveyance the only way shown is one leading, not through the carriage gates at the Gower Street end but through the pedestrian entrance. The way there shown, coloured green on the map and four feet wide, leads straight up along the southern side of No. 12 to the back of No. 12, where it turns at right angles

(1) (1887) 35 Ch. D. 317, 331. (2) [1921] 1 Ch. 322, 332.

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and runs along the backs of Nos. 12 to 15 to the back part of No. 16. At first sight one would say that is the way granted the plaintiff and nothing else, but the plaintiff contends that on the true construction of the parcels what is granted to her in the conveyance is not only that four-feet footway which is coloured green on the plan, but that separately and independently of that there is granted to her in the parcels a roadway extending from her premises round the backs of Nos. 12 to 15 and so out through the carriage gates into Gower Street. She claims that upon the grammatical construction of the words there is granted to her the right to use the road or way at the back of the buildings or properties, Nos. 12, 13, 14 and 15 Gower Street aforesaid, and also the way or passage leading into Gower Street aforesaid and coloured green on the plan. It appears to me the plaintiff's construction is not correct. You must read the plan with the parcels and take the two together. The plaintiff's construction involves separate grants of a carriage way and a footway, the carriage way having no site nor termini indicated. There is another objection to the plaintiff's construction, and that is that it casts on her the liability to repair the footway only, and not the carriage way—a curious proceeding. In my opinion the grant is a grant of one way described in two sections, the first section being called the road or way at the back of Nos. 12–15, and the second section the way or passage leading into Gower Street, and the two sections, treated as one way, are described as coloured green on the plan.

Then the plaintiff says that even if she gets no right to use the carriage way under the grant she gets it under the habendum: "To hold the same subject to and with the benefit of all such easements and privileges in the nature of easements as were then subsisting in respect of property thereby conveyed and the said adjoining property of the vendor." It is conceded that the occupier of No. 16 did from time to time have carts coming through the Gower Street gates, round through and along this road, though over no defined roadway, to the gates at the back of No. 16, for the

purpose of carting away house refuse and of bringing in coals. The plaintiff then says that having established that fact she gets that privilege as a continuing privilege under the habendum. It appears to me that the answer to that as a purely conveyancing point is contained in the passage from Sheppard's Touchstone, cited by Mr. Bennett. "The premises of a deed are all the foreparts of the deed before the habendum . . . . and the office of this part of the deed is rightly to name the grantor and grantee, and to comprehend the certainty of the thing granted. . . . . And herein also is sometimes (though improperly) set down the estate. . . . . The habendum of a deed . . . . doth properly succeed the premises. . . . . And the office hereof, is to set down again the name of the grantee, the estate that is to be made and limited, or the time that the grantee shall have in the thing granted or demised, and to what use. . . . . And herein also is sometimes, though needlessly, set down again the thing granted": Sheppard's Touchstone, 74. "If the thing granted is not named in the premises, it will not pass, though named in the habendum": Norton on Deeds, 1906 ed., p. 284. This rule is laid down in Sheppard's Touchstone. "And therefore if a man grant Blackacre only, in the premises of a deed, habendum Blackacre and Whiteacre, Whiteacre will not pass by this deed": Sheppard's Touchstone, 76. The learned author of Norton on Deeds, at p. 284, says that passage is cited with approval in Davidson's Precedents, 4th ed. I think that unless the plaintiff can show that the right she claims was granted to her a general reference in the habendum will not grant it. Mr. Hurst, on her behalf, said the rule was subject to exceptions, but on looking at the authorities he relied on it is clear that if the subject matter in question is truly a matter appurtenant to that which is granted and is referred to in the habendum it will pass, not by virtue of the reference to it in the habendum, but by virtue of the grant of the thing to which it is appurtenant. From this point of view the habendum does not help the plaintiff.

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The plaintiff also contended that she obtained the right claimed under s. 6, sub-s. 2, of the Conveyancing Act, 1881, which is as follows: "A conveyance of land, having houses or other buildings thereon, shall be deemed to include and shall by virtue of this Act operate to convey, with the land houses or other buildings . . . . all liberties privileges easements rights and advantages whatsoever appertaining or reputed to appertain to the land houses or other buildings conveyed . . . . or at the time of conveyance enjoyed with . . . . the land houses or other buildings conveyed." In view of the finding of fact in the plaintiff's favour as to the privilege which was enjoyed at the date of the conveyance to her I think she comes within the terms of sub-s. 2, but the point against her arises under sub-s. 4, which provides that s. 6 shall apply only if and so far as a contrary intention is not expressed in the conveyance. Is there in this conveyance an intention expressed that s. 6 shall not apply? In my opinion there is. This is a strong case for the application of the maxim expressio unius est exclusio alterius. If the parties intended s. 6 to confer on the plaintiff a right to use the roadway from the back of No. 16 to Gower Street it is strange that there should be an express grant to her of a right of way over only four feet of the roadway which she claims to be entitled to use. There is in express terms a grant of a defined right of way to the plaintiff, and in the face of that fact it is difficult to imagine that the grantee of the footway should have intended to claim under the Act a right of roadway over and along a site of which the footway expressly granted actually formed a part. On this point plaintiff's counsel relied on the habendum, which he said showed that the parties intended this quasi-easement should be enjoyed by the plaintiff. In my opinion the habendum indicates that the parties contemplated that quasi-easements should be enjoyed by virtue of the conveyance and not by virtue of the statutory operation of s. 6. As to the question of rectification there is no evidence that there was any antecedent agreement under which the defendant Richards agreed to grant a road wide enough for

a carriage. The plaintiff fails in all her contentions, and the action must be dismissed.

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Solicitors: *Maude & Tunnicliffe, for E. J. Hall, Bilston; Ward, Bowie & Co., for Howard Cant & Cheatle, Birmingham; Rawle, Johnstone & Co., for Fowler, Langley & Wright, Wolverhampton.*

J. B. B. M.

BOOTH *v.* THOMAS.

RUSSELL J.
1925
Oct. 29, 30; *Nov.* 2, 20.

[1925. B. 1495.]

Landlord and Tenant—Lease—Adjoining Landowner—Confinement of natural Stream in Culvert—Non-repair of Culvert—Damage to Lessee—Breach of Covenant for quiet Enjoyment—Derogation from Grant—Omission of a Duty—Liability of Lessor.

In 1879 the owner of land, which was covered with slag and through which ran a natural stream, inclosed the stream in a culvert. In 1886 he granted to certain persons a lease for ninety-nine years of part of the land with the building on it, retaining the adjoining part through which the culvert ran. The foundations of the south wall of the building did not reach the soil, but rested on the slag. The lease contained an express covenant by the lessor for quiet enjoyment. In 1924 the culvert was in a bad state of repair, with the result that the stream broke through the culvert and scoured away the foundations of the south wall, so that it collapsed. At that time the lease was vested in the plaintiffs, while the land under which the culvert ran and the reversion to the leased land, expectant on the determination of the lease, were vested in the defendant:—

Held, that confining the stream in an artificial structure incapable of retaining it was an act of the defendant, which had interrupted or disturbed the lessee's quiet enjoyment of the land, and that therefore the plaintiff was entitled to succeed not only on the ground of breach of covenant for quiet enjoyment but also on the ground of derogation from grant.

Semble, the omission to keep the culvert in repair was an omission of a duty to the adjoining landowner. It was the duty of the owner of the culvert, which if neglected might cause damage to the adjoining property of another, to prevent such damage by taking reasonable precautions.

WITNESS ACTION.

In the year 1875 a certain site at Glebeland Place, Merthyr Tydfil, was the property of one David Davies. It is shown

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coloured pink and green on the block plan to the Exhibit, W.J. 1. It consisted of a slag heap running down to the Morlais Brook, which was a natural stream flowing from East to West through the green, until it joined the Taff River, a short distance away. Immediately to the East of Davies' property there was a footbridge over the brook. In 1878 the Local Board displaced the footbridge, and ran the road over the brook, culverting the brook for the width of the road. In 1879 Davies continued the culvert in a westerly direction for a distance of some twelve yards under the green.

Davies' site could not have been utilized for any building purposes unless and until the brook had been culverted throughout the whole length of the green. This was eventually done by Davies.

By October 20, 1886, a building had been erected along the southern edge of the pink, and on that date Davies executed a lease of the pink with the building upon it to certain persons for a term of ninety-nine years, the lease providing that the lessees should at all times keep the demised buildings for the purpose of religious worship. The building had been erected by the lessees, and the consideration for the lease consisted of the moneys expended by the lessees in such erection, the rent reserved, and the lessees' covenants. The lease contained an express covenant by the lessor for quiet enjoyment.

By an indenture dated April 7, 1904, this lease was assigned to William Booth, and is now vested in the plaintiff.

Since November 19, 1907, the green and the reversion to the pink, expectant on the determination of the lease of October 20, 1886, have been vested in the defendant.

The building on the pink, which was used as a Salvation Army Hall, was built on part of the old slag heap. The foundations of the southern wall ran into the slag to a depth of some four feet. They did not reach to the natural soil, the bed of the stream. The culvert was laid on the bed of the stream, and the space on each side thereof, and above, was apparently filled up with materials taken from the heap, so that all round the culvert, and to a height of some inches above it,

there existed a more or less compact body of material, the upper surface of which constituted a way or means of access over the green to an entrance to the building on the pink. The foundations of the southern wall of the building rested on this material at a depth of some two feet six inches below the top of the culvert, but at some distance above the natural bed of the stream; in other words, between the foundations of the building's southern wall and the solid bed of the stream there existed this material derived from the slag heap alongside of which ran the culvert, about two feet away.

All went well for many years. The culvert effectively carried the brook, and the building was effectively used for its intended purposes. In the course of time, however, the building settled somewhat, as was natural, having regard to the structure of the foundations. In the course of time also the culvert, owing to the constant weight and friction of the water which it carried, wore away. It had never been repaired, and at the material time the westerly portion of the culvert under the green was in very bad repair. On the night and morning of December 22/23, 1924, after very heavy rains on the preceding days, a severe storm burst on the locality, so that the culvert in carrying away the stream (which nowhere overflowed its banks) became nearly half full. This was more than the culvert in its emaciated condition could bear. At its western end it collapsed, and its invert gave way, with the result that the Morlais Brook, breaking through the side of the culvert, and churning under the foundations of the Salvation Army Hall, scoured away the material which lay under its foundations. The foundations being left with no support, the southern wall collapsed. In this action the plaintiff claimed that the defendant was liable to him for the damage sustained by the building.

G. B. Hurst K.C. and *H. Buckmaster* for the plaintiff. If the stream had been left in its natural condition, and if as a result of that natural user of the land the water had damaged the plaintiff's property, he would have had no cause of complaint, but it is otherwise where the stream is inclosed in an artificial

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structure, and as a result of an imperfection the water escapes and does damage: *Rylands* v. *Fletcher*. (1) Where the ordinary and lawful enjoyment of the demised land is substantially interfered with by an act of the lessor, the covenant for quiet enjoyment is broken: *Sanderson* v. *Berwick-on-Tweed Corporation* (2); *Aldin* v. *Latimer Clark, Muirhead & Co.* (3); *Harrison, Ainslie & Co.* v. *Lord Muncaster*. (4)

The act here which disturbed the plaintiff's quiet enjoyment was the confining of the stream in a structure incapable of retaining it. There also may be a breach of the covenant for quiet enjoyment by an act of omission: *Cohen* v. *Tannar* (5); *Anderson* v. *Oppenheimer* (6); and the law imposes a duty upon the owner of an artificial structure, such as this culvert, which, if neglected, may cause damage to the adjacent property of another, to prevent such damage by taking reasonable precautions: *Anderson* v. *Cleland* (7); *Hargroves, Aronson & Co.* v. *Hartopp*. (8)

If a lease is granted for a particular purpose the lessor is under an obligation not to use the land retained by him so as to render the land demised unfit for the material purpose for which the demise was made: *Browne* v. *Flower* (9); *Harmer* v. *Jumbil (Nigeria) Tin Areas, Ld.* (10) Here the buildings were demised for the purpose of religious worship, and the lessor, having allowed the water to escape from the culvert on his land, is liable for the damage done to the building.

Preston K.C. and *G. D. Johnston* for the defendant. There is no breach of the covenant for quiet enjoyment and no derogation from the grant, because the defendant has failed to keep the culvert in repair. To be a breach of the covenant there must be something which amounts to doing or allowing the act complained of by an active participation in the act, and to say that there has been a derogation from the grant is

(1) (1868) L. R. 3 H. L. 330, 338, 339.
(2) (1884) 13 Q. B. D. 547, 551.
(3) [1894] 2 Ch. 437, 444.
(4) [1891] 2 Q. B. 680, 685.
(5) [1900] 2 Q. B. 609, 614.
(6) (1880) 5 Q. B. D. 602, 607, 608.
(7) [1910] 2 I. R. 334, 373, 379.
(8) [1905] 1 K. B. 472, 477.
(9) [1911] 1 Ch. 219, 224, 225.
(10) [1921] 1 Ch. 200, 222.

only to assert in another way that there has been a breach of the covenant for quiet enjoyment: *Malzy* v. *Eichholz*. (1) In *Anderson* v. *Cleland* (2) the action was one for negligently and in breach of duty failing to maintain a culvert, and the question was whether the duty lay on the plaintiff or the defendant. It was conceded that the defendant would be liable if, on the true construction of the lease, the culvert was vested in him. There was no decision on the point that has to be decided here. It is clear that the building could not have been erected in the manner in which it was erected, but for the existence of the culvert, which was therefore for the benefit of the lessor and the lessee. The rule of law that a person who brings on his lands anything likely to do mischief if it escapes must keep it there at his peril is not an absolute rule where the circumstances show that the complainant has accepted the risk: *Fletcher* v. *Rylands*. (3) Neither does the rule apply when the artificial work which is the cause of the damage is maintained for the common benefit of the plaintiff and defendant: *Carstairs* v. *Taylor* (4); or with the consent of the plaintiff: *Gill* v. *Edouin* (5); *Blake* v. *Woolf* (6); *Attorney-General* v. *Cory Bros. & Co.* (7)

It is submitted that the predecessor in title of the plaintiff consented to the existence of the culvert, or else it was constructed and maintained for the common benefit of the original lessor and lessee. It is submitted also that the bursting of the culvert was caused by a flood, an act of God, and therefore the defendant is not liable: *Nichols* v. *Marsland*. (8) In order that a phenomenon should fall within the rule of law with regard to act of God it is not necessary that it should be unique; it is enough that it is extraordinary, and could not reasonably be anticipated: *Nitro-Phosphate and Odam's Chemical Manure Co.* v. *London and St. Katharine's Docks Co.* (9)

Cur. adv. vult.

(1) [1916] 2 K. B. 308, 314, 315.
(2) [1910] 2 I. R. 334.
(3) (1866) L. R. 1 Ex. 265, 287.
(4) (1871) L. R. 6 Ex. 217, 221.
(5) (1894) 71 L. T. 762; (1895) 72 L. T. 579.
(6) [1898] 2 Q. B. 426.
(7) [1921] 1 A. C. 521.
(8) (1876) 2 Ex. D. 1.
(9) (1878) 9 Ch. D. 503, 515.

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Nov. 20. RUSSELL J. The plaintiff is the lessee of the land coloured pink on the plan on which the building stands, or stood. The defendant is owner in possession of the land coloured green under which the culverted brook flows, and is owner of the pink subject to the lease. The problem to be solved is whether the defendant, the owner of the land under which the culvert lies, and the lessor of the building which has collapsed, is liable to the plaintiff for the damage occasioned to the Salvation Army Hall.

There is no room for doubt as to what caused the collapse of the hall. A witness called for the defendant makes it clear. He said that the damage to the Salvation Army Hall was undoubtedly caused by the failure of the culvert. During forty-seven years water had been travelling through the culvert at the rate of eighteen feet per second, carrying with it débris of all descriptions—sand, grit, stone—which had worn away the invert, which supported the haunches, with the result that the haunches collapsed and the water spread under the foundations. He also said that although the flood was a contributing cause to the collapse, yet if there had been no flood the culvert would not have been there sound to-day, because it had practically come to its ultimate end by reason of the wear and tear.

As regards the particular rainstorm which caused the culvert to collapse, I find upon the evidence that though severe, it was not shown to have been of such an unusual character in the locality that the amount of water which the culvert was called upon to carry could not reasonably have been anticipated. The collapse of the culvert was not attributable to vis major or the act of God.

The plaintiff claims that the defendant is liable to him for the damage he has sustained to his building. The plaintiff bases his claim on three grounds—namely, (1.) Breach of covenant for quiet enjoyment; (2.) derogation from grant; and (3.) the principle of *Rylands* v. *Fletcher*. (1)

The first two grounds, as it seems to me, will, upon the facts, stand or fall together.

(1) L. R. 3 H. L. 330.

The covenant for quiet enjoyment runs thus: ". . . . And also that the said lessees their executors administrators and assigns well and faithfully paying the said rents hereinbefore reserved and performing the covenants hereinbefore on their part and behalf to be paid and performed shall and may from time to time and at all times hereafter during the said term hereby granted peaceably and quietly have hold and enjoy the said premises hereby demised without interruption or disturbance by the said lessor his heirs or assigns or any other person or persons lawfully or equitably claiming by through or under them or any of them."

It was suggested that this covenant could not be relied upon by the plaintiff, because there had been breaches of covenant on his part, but this was scarcely pressed. Suffice it to say that even if the observance of the lessee's covenants constituted a condition precedent to the lessee's right to sue, no breach of covenant by the plaintiff was established.

That there has been an interruption or disturbance of the lessee's enjoyment of the premises is clear. The question for consideration is: Was it an interruption or disturbance by the defendant?

The defendant's contention upon this part of the case was that he had done no act at all, and that his mere omission to keep the culvert in such a condition that the waters which it carried would not escape and undermine the plaintiff's foundations was no breach of the covenant for quiet enjoyment.

It is no doubt true that in the authorities cited the word "act" nearly always occurs. Thus the Court of Appeal in *Sanderson* v. *Berwick-on-Tweed Corporation* (1) expresses itself: "But it appears to us to be in every case a question of fact whether the quiet enjoyment of the land has or has not been interrupted; and where the ordinary and lawful enjoyment of the demised land is substantially interfered with by the acts of the lessor, or those lawfully claiming under him, the covenant appears to us to be broken, although neither the title to the land nor the possession of the land may be otherwise affected."

(1) 13 Q. B. D. 547, 551.

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Other instances need not be cited. On the other hand, Vaughan Williams L.J., in *Cohen* v. *Tannar* (1), states that the covenant may be broken by an act of omission, if it be the omission of some duty; and in *Anderson* v. *Oppenheimer* (2) Cotton L.J., and I think also Brett L.J., expressed the view that an act of omission may be tantamount to an act of commission, so as to be a breach of the covenant.

Assuming that it could be said that the defendant in this case had done no act, I should myself have been prepared to hold that the omission to keep the culvert in a fit condition involved the omission of a duty to the adjoining landowner, and that it was the duty of the owner of this culvert, which, if neglected, might cause damage to the adjacent property of another, to prevent such damage by taking reasonable precautions. Authority for this proposition may be found in the case, before the Irish Court of Appeal, of *Anderson* v. *Cleland* (3), and in *Hargroves, Aronson & Co.* v. *Hartopp.* (4) But however that may be, it seems to me that it can be truly said in this case that there was an act done by the defendant which caused the interruption or disturbance to the lessee's enjoyment—namely, the confinement of the waters of the Morlais Brook in an artificial structure incapable of retaining them.

If I am right in this view the plaintiff is entitled to succeed, not only on the ground of breach of covenant for quiet enjoyment, but also on the ground of derogation from grant. This was conceded by the defendant. The two points stand or fall together.

The remaining ground of the plaintiff's claim was based on the principle of *Rylands* v. *Fletcher* (5)—namely, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape. The prima facie liability of the

(1) [1900] 2 Q. B. 609.
(2) 5 Q. B. D. 602, 607, 608.
(3) [1910] 2 I. R. 334.
(4) [1905] 1 K. B. 472.
(5) L. R. 3 H. L. 330.

defendant was scarcely contested. The argument on his behalf sought to bring the case within exceptions to the principle. It was argued that the escape of the water was the consequence of vis major or the act of God ; but I have already held on the facts that this exception does not apply here. It was then argued that the culvert was maintained for the common benefit of the plaintiff and defendant, and with the consent of the defendant, and that accordingly the case fell within that exception. That such an exception exists is clear ; but in the present case the evidence does not satisfy me that the case falls within the exception. It is true that at one point a wall of the hall is built into a wall situate at the western end of the culvert, but though this indicates knowledge by the plaintiff of the existence of the culvert (which, indeed, is self-evident), it does not in my opinion prove the consent within the meaning of the exception. There is no evidence of the circumstances in which the culvert was erected which would enable me to hold that the culvert was erected in consequence of any arrangement between the original lessor and lessee, or that it was erected for any purpose except for the benefit of David Davies, to enable him to turn to account this slag heap by developing it as a singularly ineligible building site.

I need not, however, and do not decide this case on *Rylands* v. *Fletcher* (1), because I hold that the plaintiff is entitled to succeed on the first two grounds of his claim.

I order an inquiry as to the damages sustained by the plaintiff by reason of the bursting of the culvert, and I order the defendant to pay the costs of the action. There will be liberty to apply after the inquiry as to damages has been answered, and generally.

Solicitors : *Ranger, Burton & Frost ; E. A. S. Howell, for Simons, Smyth & Daniel, Merthyr Tydfil.*

(1) L. R. 3 H. L. 330.

J. B. B. M.

ROMER J.

1925

Oct. 29, 30; *Nov.* 5.

In re WHITROD.

BURROWS *v.* BASE.

[1925. W. 635.]

Will—Residue of Residue—Aliquot Shares—Residue of Aliquot Shares—Lapsed Shares—Partial Intestacy.

A testator, by his will, directed his executors, after payment of his debts, funeral and testamentary expenses, to realize all his real and personal property, and gave nine-tenth parts thereof in aliquot tenth or twentieth parts to certain persons. He also gave an annuity and two sums of 30*l.* and 40*l.* respectively to certain named persons and "to Non-Con. ministers of Diss the residue in equal shares." Some of the persons to whom tenth or twentieth parts were given, the annuitant, and the legatee of the sum of 30*l.* predeceased the testator. This summons was issued for the purpose of determining the effect of the residuary gift to the Nonconformist ministers:—

Held, that the residue given to the Nonconformist ministers was a true residue of the remaining one-tenth part, which had been charged with the annuity and the two sums of money, and that they benefited by the lapse of the annuity and the 30*l.* legacy; that it was not, however, a true residue of the residuary estate in the sense that they could benefit by the lapse of any of the other tenth parts; that they therefore took only one-tenth share of the residue, less the 40*l.* legacy, and that there was an intestacy as to the undivided shares of those persons who had predeceased the testator, which had lapsed and which would accordingly go to the heir and next of kin according to their respective interests.

Adjourned Summons.

The testator by his will made on October 19, 1891, after appointing executors, directed as follows: "I direct my executors to pay my just debts and funeral and testamentary expenses and to realise all my real and personal property as soon as conveniently can be at the discretion of my executors and I give and bequeath To Miss Kate Mathew Bracken Villa Felixstowe One tenth part To my cousin Louisa daughter of Mrs. Hy. Broad Ipswich Two tenth parts thereof To Thomas Whitrod's children now of Norwich One tenth part To Mrs. Gower of Lower Bathanga Victoria Australia One tenth part To Diss Wesleyan Trustees to be used by them to clear off building debt if there be any One tenth part To Mrs. Corbyn late of Diss One twentieth part To Norfolk and Norwich Hospital One twentieth part To Mr. Alfred G. Bobby's

children One tenth part To Mrs. Whitrod Mount St. Diss 5*l.* to be paid to her every half year during her life To Mrs. Gostling Linden House Diss One tenth part To Mr. Thos. P. Gostling Linden House 30*l.* To Mr. Walter Burrows St. Nicholas Street 40*l.* To Non-con. Ministers of Diss the residue in equal shares."

The testator died on March 12, 1923. Kate Mathew, Louisa Broad, Mrs. Gower, Mrs. Corbyn, Mrs. Whitrod, Mrs. Gostling, and Thomas P. Gostling predeceased the testator. This summons was issued by the surviving executor of the will for the determination of the question (inter alia) whether the aliquot parts of the testator's estate given by the will to persons who predeceased the testator were undisposed of by the will or passed under the gift therein contained "to Non-Con. ministers of Diss the residue in equal shares," or whether they ought to be added to the aliquot parts given by the will to persons who survived the testator.

Howard Wright for the plaintiff.

Hughes K.C. and *Daynes* for the heir at law and one of the next of kin. There is an intestacy as to the aliquot shares of residue bequeathed to those persons who predeceased the testator: *Jull* v. *Jacobs* (1); *Easum* v. *Appleford* (2); Jarman on Wills, 6th ed., pp. 1052, 1054, 1057.

J. V. Nesbitt for certain Nonconformist ministers of Diss. The gift to the Nonconformist ministers of Diss is a gift of two residues, and not merely a gift of one-tenth of the testator's residue after payment out of the legacies.

Winterbotham for another Nonconformist minister of Diss. The question is dealt with in Hawkins on Wills, 3rd ed., p. 52: see also *Harley* v. *Moon*. (3) There is nothing in the will to show that the residue bequeathed to the ministers is to be read as "the residue of the remaining one-tenth part." It is the residue of whatever fund the testator has been disposing of by one-tenth parts, all the way down.

Whitehead (*Dighton Pollock* with him) for the Attorney-General.

(1) (1876) 3 Ch. D. 703. (2) (1840) 5 My. & Cr. 56.
(3) (1861) 1 Dr. & Sm. 623.

ROMER J.
1925
WHITROD, *In re.* BURROWS *v.* BASE.

Attwater, *L. W. Byrne*, *William Barnard*, *Tudor Davies* and *Myles* for other parties interested.

Hughes K.C. in reply referred to *Green* v. *Pertwee*. (1)

Cur. adv. vult.

Nov. 5. ROMER J. [after stating the terms of the will as above set out, continued :] The testator did not die until March 12, 1923. By that time Kate Mathew, Louisa Broad, Mrs. Gower, Mrs. Corbyn, Mrs. Whitrod, Mrs. Gostling, and Thomas P. Gostling were all dead, and consequently the dispositions in favour of these persons made by the testator's will failed to take effect. The question to be determined is as to who are now entitled to the shares and interests to which those persons would have been entitled had they survived the testator.

It is contended on behalf of the heir at law and next of kin of the testator that those shares and interests passed as upon an intestacy. It is contended, on the other hand, by the Nonconformist ministers of Diss that such shares and interests passed to them by the gift of "the residue in equal shares."

If the gift to the Nonconformist ministers be a bequest of the testator's residuary estate the contention on their behalf must necessarily succeed. If, on the other hand, the gift to them is merely a bequest of the residue of the residuary estate the question is one of some difficulty. The distinction between these two kinds of bequest is referred to by Lord Cottenham in *Easum* v. *Appleford* (2) in these words : " The general rule that a residuary clause passes a lapsed legacy—that which was intended to be the subject of bounty to another—is founded upon this,—not that it effects, in specie, what the testator intended, for he probably contemplated nothing beyond the particular legacy taking effect, but because the residuary clause is understood to be intended to embrace everything not otherwise effectually given ; because, as Sir W. Grant expresses it in *Cambridge* v. *Rous* (3), the testator is supposed to give it away from the residuary

(1) (1846) 5 Hare, 249. (2) 5 My. & Cr. 56, 61.
(3) (1802) 8 Ves. 12, 25.

legatee only for the sake of the particular legatee; so that, upon failure of the particular intent, the Court gives effect to the general intent. When, therefore, from the construction of the will, the presumption in favour of such general intent is negatived, the rule does not apply, and the lapsed bequest is undisposed of. Such is the case of a residuary bequest to several, as tenants in common. The share of one, dying in the testator's lifetime, does not pass; because, the testator having given to each a certain proportion of his property, according to their number, it would not be consistent with such declared intention to give to the survivor a larger proportion."

In Vaughan Hawkins on Wills, 3rd ed., p. 52, that learned author, after referring to the general rule that a general residuary bequest carries lapsed and void legacies, continues: "The comprehensive import of the word residue does not extend to a gift of the *residue* of that residue. Thus, if the testator gives 10,000*l.* out of the residue of his personal estate to A., and *the residue* to B., and the bequest to A. fails, the gift to B. will not, it appears, in general carry the 10,000*l.* bequeathed to A., which will therefore be undisposed of: *Green* v. *Pertwee* (1); *Skrymsher* v. *Northcote* (2); *Lloyd* v. *Lloyd* (3); *Simmons* v. *Rudall.* (4)

"A gift of the residue of the residue of the testator's personal estate is, in fact, a gift of the residue of a particular fund. If a part of a particular fund be given to one person, and the residue to another, it is a question of intention, not subject to any particular rule, whether the gift of the residue is to be read as a gift of the mere balance of the fund after deducting the amount of the sum previously given out of it, as in the cases of *Page* v. *Leapingwell* (5) and *Easum* v. *Appleford* (6): or a gift of the entire fund subject to the gift previously made out of it, as in *Falkner* v. *Butler* (7); *Carter* v. *Taggart* (8); and *Re Harries' Trust.* (9) In the latter case,

(1) 5 Hare, 249.
(2) (1818) 1 Swans. 566.
(3) (1841) 4 Beav. 231.
(4) (1851) 1 Sim. (N. S.) 115.
(5) (1812) 18 Ves. 463.
(6) 5 My. & Cr. 56.
(7) (1765) Amb. 514.
(8) (1848) 16 Sim. 423.
(9) (1859) Johns. 199.

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if the gift of part fails, the gift of the residue may carry the whole fund : in the former case not so."

The first thing to be ascertained therefore is whether the gift to the ministers is a gift of the testator's residuary estate or merely a gift of the residue of such residuary estate. As to this I can feel no doubt. What is it of which the testator gives to Miss Kate Mathew one-tenth part ? Clearly it is the proceeds of sale of the whole of his real and personal estate after payment thereout of his debts and funeral and testamentary expenses. This surely is his general residuary estate. I do not know what else it can be. The gift to the ministers is not therefore a gift of the testator's residuary estate, but merely the residue of that residuary estate that will remain after giving effect to the preceding bequests. If this be so, the question that I have to determine is this. Did the testator intend the ministers to take whatever might remain of the residuary estate after giving effect to such of the earlier dispositions as should ultimately take effect, or merely whatever might remain after deducting the shares and sums of money previously mentioned ? Had the testator, after disposing of nine-tenths of his residuary estate, given " the residue " to the ministers, I should, without hesitation, have arrived at the conclusion that he intended the ministers to take the remaining one-tenth and no more. In *Simmons* v. *Rudall* (1) a testator gave all the residue of his real and personal estate to trustees in trust for A. for life, remainder in trust as to one-fourth for her testamentary appointees and upon further trust to divide, convey, assign and transfer all the rest residue and remainder of the trust property to B., C. and D. A. died intestate and Lord Cranworth, in holding that the one-fourth did not pass to B., C. and D., but that there was an intestacy as to that share, expressed himself as follows : " The testator subjects one-fourth of his estate, real and personal, to the appointment of the survivor of the tenants for life ; and then gives the rest and residue, after their deaths, to others. The words are as follows :— ' And upon further trust to divide, convey, assign and transfer

(1) 1 Sim. (N. S.) 115, 138.

all the rest, residue and remainder of the said trust-monies and real estate.' I think this passage must be read as if the words had been all the real and personal estate except the one-fourth subjected to the appointment of Sarah Armstrong and her daughter."

In *Easum* v. *Appleford* (1), already referred to, Lord Cottenham said: "The question therefore is, whether,—in the case of a will professing to dispose of a certain sum in a particular investment, and giving one sum, part of it, to one person, and another sum, other part of it, to another, and what shall remain of such sum, after paying such two legacies thereout, to a third,—that third person can take the sum first given, in consequence of a lapse by the death of the legatee. Had the whole fund been 900*l.*, and 300*l.* of it had been given to the first legatee, and 300*l.* to the second, and the 300*l.* which will remain, after paying those two legacies thereout, to the third, no question could have been made; and wherein is the difference." So too in the case which I have supposed. Had the testator, after bequeathing nine-tenth parts of his residuary estate, given the one-tenth part that remains to the ministers, no question could have been made. And wherein would have been the difference? But, in the present case, the testator has complicated matters by giving the annuity and the two sums of money, the annuity being given after he had disposed of eight-tenth parts of his residuary estate and the two legacies after he had disposed of yet another one-tenth. In cases where a testator, after giving pecuniary legacies out of a particular fund, gives the residue of that fund to A., there is usually but little difficulty in arriving at the conclusion that A. is intended to get the benefit of the lapse of any of the pecuniary legacies, unless the testator has shown that he is dealing with a fund of a known amount.

If the testator here had merely directed payment of the annuity and the two sums of 30*l.* and 40*l.* out of his residuary estate and had then given the residue to the ministers, I should not have doubted that the ministers, in the events

(1) 5 My. & Cr. 56, 61.

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that happened, would have taken the whole residuary estate, less only the 40*l.* given to the plaintiff Burrows. But I cannot bring myself to think that the testator, after disposing of nine-tenths of his residuary estate in undivided shares, intended the ministers to take more than one-tenth under the gift of "the residue." It seems reasonably clear from the terms of the will that the testator considered a tenth part to be sufficient to provide the annuity and the two sums of money. If this were not so, it is incredible that he should have disposed of nine-tenths of his residuary estate in undivided shares. It is indeed a fact, though an irrelevant fact, that a tenth part of his residuary estate did amount to some 700*l.* But the testator must also have had in his mind the possibility that the remaining tenth would be more than sufficient to provide for the annuity and the two sums of money and that there would be a residue of that tenth left over. In my opinion it is this residue that he has given to the ministers and no more. I think that, according to its true construction, the will is to be read as though, after disposing of nine-tenths of his residuary estate, the testator directed the remaining tenth to be paid to the ministers charged however with the annuity and the two sums of money. In other words, I think that the residue given to the ministers is a true residue of the one-tenth share, so that they benefit by the lapse of the annuity and the 30*l.*, but that it is not a true residue of the residuary estate in the sense that they can benefit by the lapse of any of the other undivided shares.

The result in my opinion is that the ministers take only one-tenth share of the residue less the 40*l.* given to the plaintiff, and that there is an intestacy as to the undivided shares that have lapsed, which will accordingly go to the heir and next of kin according to their respective interests.

Solicitors: *Tarry, Sherlock & King, for Lyus, Burne & Lyus, Diss; W. G. Elsmore; Waterhouse & Co., for Cozens-Hardy & Jewson, Norwich; W. A. Zabell, for Sprake & Co., Bungay; Treasury Solicitor.*

J. L. D.

BOULDER PROPRIETARY
[1948] 1 Ch. 145

SPENCER *v.* KENNEDY.

ASTBURY J.

1925 Dec. 11.

[1925. S. 4537.]

Company—Directors—"Casual vacancy"—Appointment by Board—"Qualified person"—Share Qualification—Transfer passed for Registration before Appointment — Actual Registration after Appointment — Invalidity of Appointment.

Retirement by Rotation — Ordinary General Meeting — Reappointment or Replacement discussed—Adjournment of Meeting for less than a Week—Replacement at adjourned Meeting—Validity—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, c. 69), *Table A, art.* 82.

A private company was governed partly by special articles and partly by Table A. Table A, art. 70, fixed the qualification of a director as "the holding of at least one share." Special art. 20 empowered the directors to appoint any other "qualified person" either to fill a casual vacancy or as an addition to the Board.

At a full Board meeting on Saturday, November 14, transfers of shares to two outsiders were duly passed for registration, after which the transferees were forthwith elected directors. The transfers were registered on the following Monday:—

Held that, though before their appointment the transferees had acquired an absolute right to registration, they were not "qualified persons" before actual registration, and their appointment as directors was invalid.

Table A, arts. 78 and 80, provide for one-third of the directors retiring by rotation at each ordinary meeting and being eligible for re-election, and art. 81 enables the company at that general meeting to fill up the office so vacated.

Art. 82 provides that: "If at any meeting at which an election of directors ought to take place the places of the vacating directors are not filled up, the meeting shall stand adjourned till the same day in the next week at the same time and place, and, if at the adjourned meeting the places of the vacating directors are not filled up, the vacating directors, or such of them as have not had their places filled up, shall be deemed to have been re-elected at the adjourned meeting."

A director was due to retire by rotation at the annual general meeting of Wednesday, November 11, and part of the business of which notice was given was the election of a director in his place. The retiring director's re-election was moved at the meeting, but the matter, though discussed, was not finally dealt with, and the meeting was adjourned successively to Thursday, November 12, Saturday, November 14, and Tuesday, November 17. At the last adjournment the original motion for the retiring director's re-election was put and lost, and another shareholder was proposed and elected in his place.

Held that, as the adjourned meeting was merely a continuation of the original meeting at which the question of the retiring director's

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re-election or replacement was considered, the proceedings were in order, and art. 82 had no application.

Semble. Art. 82 only applies to a case where the retirement of a director by rotation and the necessity for his re-election or replacement is entirely lost sight of at the annual meeting.

MOTION.

The Revelation Expanding Suit Case Company, Ld., was incorporated as a private company on October 3, 1923, to purchase and work a patent belonging to the defendant Ernest Kennedy, who with his nominee, the defendant Jerome Kennedy, received 250 shares therefor. The capital was 500*l.* in 1*l.* shares, which were all issued as fully paid as follows :—

The defendant Ernest Kennedy ..	249	shares.
The defendant Jerome Kennedy ..	1	,,
The plaintiff Spencer	200	,,
Frederick Martin	25	,,
Henry Martin	25	,,
	500	

There was some doubt whether one of Spencer's shares was not issued to a nominee Knowles, but nothing turned on this. The Spencer and Martin shares were paid in cash. The signatories to the memorandum were the defendant Jerome Kennedy and Henry Martin.

The company partly adopted Table A and partly had special articles.

The special articles provided as follows :—

By art. 4 the company was entitled to treat the person whose name appeared upon the register in respect of any share as the absolute owner thereof, and was not obliged to recognize any equities.

By art. 17 the number of directors was not to be less than two nor more than five.

By art. 18 the defendant Ernest Kennedy, Henry Martin, the plaintiff Spencer, and Frederick Martin were appointed the first directors, the defendant Ernest Kennedy and Henry Martin being appointed permanent directors for life.

By art. 19 the defendant Ernest Kennedy was appointed chairman of the Board so long as he was a director.

By art. 20: "The directors shall have power at any time and from time to time to appoint any other qualified person to be a director of the company either to fill a casual vacancy or as an addition to the Board, but so that the total number of directors shall not at any time exceed the maximum number hereinbefore fixed. Any director so appointed shall hold office only until the next following ordinary general meeting, when he shall retire, but shall be eligible for re-election."

By art. 22 the quorum of directors was two.

By art. 23, "The office of a director shall be vacated . . . . (*d*) If he cease to hold the necessary share qualification or do not obtain the same within one month from the date of his appointment."

By art. 25 Henry Martin was appointed the first managing director, subject to the terms of an agreement which provided that he should hold office for five years from the dates of incorporation.

The relevant articles of Table A were as follows:—

By art. 18: The instrument of transfer of any share in the company shall be executed both by the transferor and transferee, and "the transferor shall be deemed to remain a holder of the share until the name of the transferee is entered in the register of members in respect thereof."

By art. 70: "The qualification of a director shall be the holding of at least one share in the company, and it shall be his duty to comply with" s. 73 of the Companies (Consolidation) Act, 1908, which requires him, unless already qualified, to obtain his qualification within two months after his appointment, or such shorter time [here one month, special article 23 (*d*)] as may be fixed by the company's regulations.

By art. 78 one-third of the directors are to retire at each ordinary meeting.

By art. 80 a retiring director is eligible for re-election.

By art. 81 the company at the general meeting at which

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a director retires in manner aforesaid may fill up the vacated office "by electing a person thereto."

By art. 82: "If at any meeting at which an election of directors ought to take place the places of the vacating directors are not filled up, the meeting shall stand adjourned till the same day in the next week at the same time and place, and, if at the adjourned meeting the places of the vacating directors are not filled up, the vacating directors, or such of them as have not had their places filled up, shall be deemed to have been re-elected at the adjourned meeting."

By an agreement of January 5, 1924, made between the company and the plaintiff Spencer, in consideration of Spencer having the option of taking up 200 shares at par, Spencer agreed to guarantee the company's bank overdraft.

By a contemporaneous agreement between the plaintiff Spencer and the defendant Ernest Kennedy it was agreed that if Spencer reduced his guarantee to such an amount below 15,000*l.* as the majority of the Board deemed insufficient for working capital Ernest Kennedy should have the option of purchasing the 200 shares at par.

The present overdraft was 13,929*l.*, and the plaintiff Spencer had also lent the company another 3000*l.* on a deposit of the title deeds of the company's leasehold premises in Piccadilly.

The company had an extraordinary success, and the shares were worth very many times their par value, but unfortunately there was a certain amount of friction as to the management.

The annual general meeting was held on Wednesday, November 11, 1925, at 6.30 P.M., in the presence of the defendant Ernest Kennedy, chairman, the defendant Jerome Kennedy, the plaintiff Spencer and Henry Martin. Part of the business, of which notice was given, was the election of a director in the place of Spencer, who was due to retire by rotation, and offered himself for re-election. His re-election was moved and seconded by Henry Martin and himself, but on the chairman Ernest Kennedy stating that he would be unable to support it, as he desired to get control of the Board, that Jerome Kennedy would support him, and that he would use his casting vote, the matter was not then dealt

with. The general meeting was then adjourned successively to Thursday, November 12, at 5.30 P.M., Saturday, November 14, at noon, and Tuesday, November 17, at 10 A.M.

In the meantime, on Friday, November 13, Henry Martin, being of opinion that the company's success would be jeopardized if the defendant Ernest Kennedy got control of the Board, convened a Board meeting for Saturday, November 14, at 11 A.M., to consider the resignation of the auditors, the passing of transfers, and the appointment of new directors. At this meeting, at which the defendant Ernest Kennedy, chairman, the plaintiff Spencer, Henry Martin, and Frederick Martin were present, a transfer of one share from Henry Martin to the plaintiff Henry Morgan was produced and passed for registration. The resignation by letter of the auditors, Morgan Brothers & Co., was accepted. The appointment of the plaintiff Henry Morgan as an additional director, under special art. 20, was proposed and seconded by Henry and Frederick Martin and carried, and he then attended the meeting.

Transfers of Frederick Martin's twenty-five shares—namely, one share to the plaintiff Francis Morgan and twenty-four to Henry Martin, were then produced, and on a resolution proposed and seconded by the new director Henry Morgan and Henry Martin, they were passed for registration. Frederick Martin then retired, and a resolution was proposed and seconded by the plaintiff Henry Morgan and Henry Martin that having lost his qualification his seat be declared vacant under special art. 23 (*d*). The plaintiff Francis Morgan was then appointed a director to fill this casual vacancy on a resolution proposed and seconded by the plaintiff Henry Morgan and Henry Martin. The plaintiff Spencer, whose directorship was in suspense, did not vote on these resolutions, and the chairman, the defendant Ernest Kennedy, stated that his own attendance was not to be taken as an admission of the validity of the meeting, or the proceedings. The three transfers were registered on Monday, November 16.

At the adjourned general meeting on Tuesday, November 17,

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the defendants Ernest Kennedy, chairman, and Jerome Kennedy, the plaintiff Spencer, Henry Martin, and the plaintiffs Henry Morgan and Francis Morgan were present. The defendant chairman Ernest Kennedy said that he had been advised that the election of the Morgan plaintiffs was invalid, and that their seats were vacant. He proposed, and the defendant Jerome Kennedy seconded, that the defendant Hope be elected in the place of the plaintiff Henry Morgan. This resolution was carried by the chairman's casting vote. He then proposed and the defendant Jerome Kennedy seconded the election of the defendant Merkin in the place of the plaintiff Francis Morgan. This also was carried by his casting vote. The resolution as to the plaintiff Spencer's re-election was then put, and lost by the casting vote. The chairman then proposed that the defendant Jerome Kennedy be elected in place of the plaintiff Spencer, and this resolution was carried by his casting vote.

No notice of intention to propose the defendants Hope or Merkin as directors had been given.

On November 20, 1925, Spencer and the two Morgans as plaintiffs commenced this action against the defendants Ernest Kennedy, Hope, Merkin, Jerome Kennedy and the company, claiming :—

(1.) A declaration that the Morgan plaintiffs were duly appointed directors at the Board meeting of November 14 and had not vacated their office.

(2.) A declaration that the resolutions appointing the defendants Hope, Merkin, and Jerome Kennedy at the general meeting of November 17 were invalid.

(3.) A declaration that nobody having been appointed in the plaintiff Spencer's place at the adjourned general meeting, which ought to have been held on November 18, he was still a director.

(4.) An injunction restraining the defendants Hope, Merkin, and Jerome Kennedy from acting as directors.

(5.) An injunction restraining all the defendants from preventing the plaintiffs from attending Board meetings or acting as directors.

On the same day notice of motion was given for interlocutory orders for the two injunctions until trial.

On the motion coming on it was at once admitted that the appointments of the defendants Hope and Merkin were invalid for want of notice, so that the only questions left were whether the Morgan plaintiffs were validly appointed, whether the plaintiff Spencer remained a director, and, if not, whether the defendant Jerome Kennedy had taken his place.

Wilfrid Greene K.C. and *Lionel Cohen* for the plaintiffs. First as to the Morgan plaintiffs. They were "qualified persons" within special art. 20 when they were appointed by the Board on Saturday, November 14. In the first place special art. 23 (*d*) shows that share qualification is not necessary at the time of appointment, but may be obtained subsequently. The word "qualified" cannot therefore refer to share qualification, but must mean "fit" or "suitable" in other respects. Secondly, if share qualification was necessary, it existed at the time. Each Morgan was only appointed after his transfer had been passed for registration, i.e., after he had a "present, absolute, unconditional right" to registration, which "purely ministerial act the company was bound to perform, and which was in fact performed on Monday, November 16." (1) A casual vacancy need not be accidental. It means any vacancy not occurring by effluxion of time, i.e., any vacancy occurring by death, resignation or bankruptcy: *York Tramways Co.* v. *Willows* (2); Palmer's Company Precedents, 12th ed., vol. i., p. 710.

Secondly, as to the plaintiff Spencer. As he was neither re-elected nor replaced at the general meeting of Wednesday, November 11, at which he was due to retire, that meeting ought for that purpose to have been adjourned to Wednesday, November 18, which was the only day that the particular matter could be dealt with under Table A, art. 82. The adjourned meetings of November 12, 14, 17 were no doubt

(1) See *Moore* v. *North Western Bank* [1891] 2 Ch. 599, 603.
(2) (1882) 8 Q. B. D. 685, 694.

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a valid continuation of the original meeting for other purposes, but so far as Spencer's re-election or replacement was concerned, they were simply dies non, and the procedure a nullity. The fact that the proper meeting of November 18 never took place is immaterial. Spencer is deemed to have been re-elected at that notional meeting : *In re Great Northern Salt and Chemical Works.* (1)

Thirdly, as to the defendant Jerome Kennedy. The same remarks apply. He was elected on the wrong day to replace the plaintiff Spencer, whose re-election was rejected on the wrong day. His election was therefore a mere nullity.

Topham K.C. and *Whinney* for the personal defendants. First as to the Morgan plaintiffs. Special art. 20 only enables the Board to appoint a qualified person. That means a person with a share qualification at the time of appointment. Otherwise the appointment is void. This share qualification is not required in the case of an appointment by the company under Table A, art. 81. In that case a qualification attained within one month of the appointment is sufficient : see Table A, art. 70 ; Companies (Consolidation) Act, 1908, s. 73 ; special art. 23 (*d*). Now under Table A, art. 70, the qualification of a director is " the holding of at least one share." But a man does not " hold a share " until he is registered : Buckley on Companies, 10th ed., p. 173 ; *Jenner's Case* (2) ; *Channel Collieries Trust* v. *Dover, etc., Light Ry. Co.* (3) ; *Société Générale de Paris* v. *Walker* (4) ; *Bainbridge* v. *Smith.* (5) It is true that a casual vacancy need not be accidental, but it is not at all clear that a vacancy deliberately caused for the purpose of appointing a new director is a casual vacancy within special art. 20.

Secondly, as to the plaintiff Spencer. His re-election was proposed at the meeting of November 11 and duly rejected at the adjourned meeting of November 17. Table A, art. 82, can only apply where the re-election or replacement of a retiring director is altogether forgotten at the general meeting.

(1) (1890) 44 Ch. D. 472, 482.
(2) (1877) 7 Ch. D. 132, 136.
(3) [1914] 1 Ch. 568, 578 ; 2 Ch. 506, 511, 514, 515.
(4) (1885) 11 App. Cas. 20, 28.
(5) (1889) 41 Ch. D. 462, 470.

If, in fact, considered at that meeting it can be dealt with at any continuation of that meeting by adjournment, e.g., on the following or any other day. The first clause is merely directory: *In re Great Northern Salt and Chemical Works* (1); and cannot prevent continuous adjournments of the actual agenda.

Thirdly, as to the defendant Jerome Kennedy. He has always been a shareholder, and he was duly elected to fill up the plaintiff Spencer's vacated place on the Board.

Vanneck for the company.

Wilfrid Greene K.C. in reply. If the defendants are right they could adjourn the general meeting from day to day as often as they liked, and keep the directorate in a state of suspended animation. That is directly contrary to the obvious meaning of Table A, art. 82, the terms of which are quite precise on the point.

ASTBURY J. [after stating the facts]. There are three questions to be answered—namely: (1.) Were the Morgan plaintiffs validly elected? (2.) Did the plaintiff Spencer remain a director? (3.) If not, was the defendant Jerome Kennedy validly elected in his place?

The plaintiffs justify the election of the Morgans under special art. 20, which enables the directors to appoint "any other qualified person" either "to fill a casual vacancy" or as "an addition to the Board." They contend that a "casual vacancy" means a vacancy not arising from ordinary retirement by rotation under Table A, art. 78.

If the plaintiffs are right on this point and on the qualification point the plaintiff Henry Morgan was appointed as an additional director, and the plaintiff Francis Morgan to fill the casual vacancy caused by Frederick Martin's loss of qualification.

The substantial question is whether the Morgans were qualified persons within special art. 20 at the time they were appointed thereunder. Now what does a "qualified person" postulate? Table A, art. 70, provides that the qualification

(1) 44 Ch. D. 472, 482.

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of a director shall be "the holding of at least one share," and requires him, unless already qualified, to comply with s. 73 of the 1908 Act, which as modified by special art. 23 (*d*) requires him to obtain his qualification within one month from his appointment. Under special art. 23 (*d*) the office of a director is vacated if he cease to hold the necessary share qualification or do not obtain it within one month of his appointment, and having regard to this one month's grace, it looks at first sight difficult to decide what the expression "qualified person" in special art. 20 really means. The plaintiffs contend that it cannot refer to an existing share qualification, but refers to fitness or suitability. I do not think that is the proper meaning. I think it means a person actually "holding" the necessary share qualification.

Special art. 20 and Table A, art. 70, are not really inconsistent, because under Table A, art. 81, the company at the general meeting at which a director retires by rotation may fill up the vacated office by electing "a person" thereto. Qualification is not expressly required in that case, though the person elected must of course qualify within one month under Table A, art. 70, and s. 73 as modified by special art. 23 (*d*). But on an appointment under special art. 20 the Board are restricted to a "qualified person," i.e., a person actually "holding" the necessary share qualification.

The plaintiffs then contend that the two Morgans were so qualified at the date of their appointment. They contend that as before their appointment the Morgan transfers were passed for registration, and nothing but the purely ministerial act of registration remained to be done, they really held one share each before they were appointed. For many statutory purposes that may be so. But they were not members until they were actually registered on Monday, November 16, and though on Saturday, November 14, at a Board meeting at which all the directors were present, they acquired an absolute right to registration, I do not think they were in fact qualified persons within special art. 20 until their actual registration on the following Monday, and though it is only a technical point, I do not think their election was valid.

The next question relates to the plaintiff Spencer. He was due to retire by rotation at the general meeting of Wednesday, November 11, and proper notice of his standing for re-election was given. At that meeting his re-election was proposed, but not dealt with, and the meeting was adjourned from time to time until Tuesday, November 17. At that adjourned meeting Spencer's re-election was refused by the defendant Ernest Kennedy's casting vote.

The plaintiff Spencer relies upon Table A, art. 82, and contends that as he was neither re-elected nor replaced on Wednesday, November 11, the meeting, so far as that portion of the business was concerned, was ipso facto adjourned to Wednesday, November 18, and if the business was not dealt with on that day he was deemed re-elected. [His Lordship read art. 82 and continued :] Though at first inclined to take that view of art. 82, I do not on consideration think it correct. It is true that Spencer retired by rotation and offered himself for re-election at the general meeting of November 11. But that meeting was validly adjourned by successive stages to November 17, and at that continued meeting the resolution for his re-election was put and lost, so that he was not re-elected. If the meeting of November 11 had not been adjourned, or if the question of Spencer's re-election or replacement had been entirely lost sight of, art. 82 would have applied, and it would have been the directors' duty to adjourn the meeting to November 18, and if he was not re-elected or replaced on that day he would have been deemed re-elected. But in the present case I think his re-election was validly dealt with and rejected at the adjourned meeting on November 17, a continuation of the original meeting at which the re-election resolution was proposed, and therefore the plaintiff Spencer is not deemed re-elected under Table A, art. 82.

The last question is whether the election of the defendant Jerome Kennedy in the place of the plaintiff Spencer was valid. No question of insufficient notice arises in this case, and the resolution to elect him under Table A, art. 81, to fill up Spencer's vacated office was duly carried by the chairman's

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casting vote. I can see no reason for holding that he was not validly elected.

The result is that I make an order restraining the defendants Hope and Merkin from acting as directors until the trial or further order, and I make no further order on the motion. Later on, if the parties desire, this motion can be treated as the trial of the action.

Solicitors: *Churchill, Clapham & Co.; Blunt, Clark & Co.*

G. R. A.

ASTBURY J. 1925 Dec. 2.

In re MAY'S SETTLEMENT.

PUBLIC TRUSTEE *v.* MEREDITH.

[1925. M. 3135.]

Power of Appointment—Settled Fund—Issue—"In such manner and form in every respect" as donee appoints—Absolute Appointment to named Infant Children in equal Shares—Ancillary Power of Advancement—Validity—Not a Delegation.

A widow with a special power of appointing a settled fund (subject to her own life interest) to her issue "in such manner and form in every respect" as she should by deed or will appoint, irrevocably appointed the fund by deed to her two infant children (naming them) in equal shares as tenants in common, and gave the trustees an ordinary power of advancement:—

Held that, having regard to the wide words of the widow's power, and the fact that she had irrevocably appointed absolute interests, the power of advancement was in no sense a delegation of her special power, but merely ancillary to the absolute appointment, and therefore valid.

In re Greenslade [1915] 1 Ch. 155, 159 distinguished.

Quasi-dicta of Lord Cozens-Hardy M.R. and Warrington L.J. in *In re Joicey* [1915] 2 Ch. 115, 120, 122, 123 applied.

ORIGINATING SUMMONS.

By a voluntary settlement dated June 22, 1908, Alice May, a spinster, conveyed certain freehold property to trustees upon trust to sell the same and invest the net proceeds in trust securities and to deposit those securities with the Public Trustee as custodian and to hold those securities upon trust

that the Public Trustee should pay the interest and income to Alice May for life for her separate use without power of anticipation during any coverture and subject thereto In trust both as to interest and capital for all or any of her issue "in such manner and form in every respect" as she should by deed will or codicil appoint And in default of and subject to such appointment In trust for her children who being sons should attain twenty-one or being daughters should attain that age or marry, in equal shares, the Public Trustee in the meanwhile until such majority or marriage to apply so much as he thought fit out of the income of the share of each child for its maintenance and education.

By his will dated December 15, 1909, Walter Robinson, after appointing the Public Trustee his executor and trustee, devised and bequeathed his residuary real and personal estate to the Public Trustee upon trust for sale and conversion and directed him to pay the income and interest of the net proceeds to Alice May for life for her separate use without power of anticipation during any coverture And subject thereto both as to income and capital In trust for all or any of her issue "in such manner and form in every respect" as she should by deed will or codicil appoint And in default of and subject to any such appointment In trust for her children who being sons should attain twenty-one or being daughters should attain that age or marry, in equal shares, the trustee in the meanwhile until such majority or marriage to apply so much as he thought fit out of the income of each child for its maintenance and education.

The testator died on February 19, 1910, and his will was proved by the Public Trustee on April 6, 1910.

On April 8, 1911, Alice May married H. A. Meredith, by whom she had two children, both still living—namely, a daughter born December 31, 1911, and a son born December 9, 1913. She had now been a widow for some years.

By a deed poll dated September 5, 1925, the widow Alice Meredith, in exercise of her settlement power, irrevocably appointed that the settlement trustees should stand possessed of the settled property upon trust after her death for her

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daughter and son (naming them) in equal shares as tenants in common and should have power at any time at their discretion (but during the widow's life only with her written consent) to raise any part or parts not exceeding altogether a moiety of the share of her daughter and son in the trust premises and apply the same for her or his advancement education or benefit as the trustees thought fit. She also appointed the will property on identical trusts.

The Public Trustee was now the sole trustee both of the settlement and the will, the trust funds whereof were now worth 1535*l.* and 5205*l.* respectively.

The widow was unable out of her own means to provide a proper education for her children, and the Public Trustee was desirous of exercising the powers of advancement given him by the deed poll, if the Court was of opinion that those powers were valid and exercisable by him.

On October 8, 1925, the Public Trustee issued this summons to determine whether upon the true construction of the settlement and the will and having regard to the provisions of the deed poll he had power to exercise the powers of advancement purported to be given him by the deed poll.

J. V. Nesbitt for the Public Trustee. The Public Trustee wishes to exercise the powers of advancement in the deed poll, but having regard to Key and Elphinstone's Precedents, 11th ed., vol. ii., p. 902, note (*f*), and *In re Greenslade* (1), he is doubtful whether they are not a pro tanto delegation of the widow's special powers.

Beebee for the widow and the two children. In *In re Greenslade* (1) the children took contingent interests with gifts over if they did not vest, so that the trustees might well be maintaining one child out of what in the event became another's income, and the power of maintenance was a void delegation of the special power.

In *In re Joicey* (2), another contingent interest case, the trustees were given power to turn an adult child's contingent share into an absolute interest and pay it over accordingly.

(1) [1915] 1 Ch. 155, 159. (2) [1915] 2 Ch. 115, 120, 122, 123.

This was of course void, but both Lord Cozens-Hardy M.R. and Warrington L.J. pointed out that if it had been an ordinary power of advancement the case might possibly have been arguable.

In Farwell on Powers, 3rd ed., p. 330, it is submitted that, notwithstanding *In re Greenslade* (1), a power of maintenance may be attached to an absolute appointment. Why not a power of advancement also ?

In the present case the infant children take absolutely in equal shares as tenants in common. An ancillary power of advancement of part of a child's absolute share may be highly beneficial to that child and cannot possibly affect any other share. It is merely part of the absolute appointment. There is, at all events, no delegation during the widow's life, as her written consent is required.

J. V. Nesbitt in reply. The powers of advancement are highly desirable, just as they might be in the case of contingent interests. The only question is whether they are authorized by the special powers. The fact that the widow can prevent their exercise can hardly prevent them being a delegation, if not so authorized.

ASTBURY J. [after stating the facts :] In *In re Greenslade* (1) a father bequeathed a share of his residuary trust funds in trust for his daughter for life and after her decease (subject to any life interest that she might appoint to her husband) in trust for her children or their issue " in such shares (if more than one) and in such manner " as she should by deed or will appoint. By her will, after appointing a defeasible life interest to her husband, the daughter appointed the settled share to all her children who should attain twenty-five before the expiration of twenty-one years from her death, or should be living at the expiration of that period, in equal shares, with a proviso under which possible grandchildren might become entitled to an interest in the share of a parent who did not attain a vested interest. She then empowered her father's trustees to apply the income of the expectant

(1) [1915] 1 Ch. 155, 159.

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share of any child or grandchild of hers for its maintenance education or benefit.

Eve J. held that the last clause was an attempted delegation of the daughter's power of appointment and therefore inoperative. He said: "In my opinion, the clause in the [daughter's] will is not a trust, but a power, and it cannot, I think, be denied that the [father's] trustees, acting under that power [of maintenance], could divert income from objects of the power of appointment, who become ultimately entitled in possession under the appointment, to other objects who, in the event, may never become entitled in possession." In other words, though the appointees' interests were contingent, the power of maintenance enabled the father's trustees to apply income in their favour, though they might never become entitled in possession. After giving a possible example of this, Eve J. continued: "It must, therefore, be admitted that the power [of maintenance] enables the trustees to modify in some respects the appointment made by the donee, a result which is for practical purposes tantamount to what would have arisen had the appointment of the income accruing prior to the period of distribution been made in express terms to such of the objects as the trustees might select. In other words, I think the power [of maintenance] is, in effect, an attempt to delegate to the trustees a personal discretion exercisable by the donee."

In *In re Joicey* (1) a father bequeathed a sum of money to his trustees upon trust for his daughter for life and after her decease in trust for her issue born in her lifetime "for such interests in such proportions and in such manner in all respects" as she should by deed or will appoint. By her will the daughter appointed the fund in trust for all her children who should survive her and being male attain twenty-one or being female attain that age or marry in equal shares. She declared that during twenty-one years from her death the income of each child's share should be paid to that child, if living. If the child died within the twenty-one years the share was to go to his or her testamentary

(1) [1915] 2 Ch. 115.

appointees, and in default to the child absolutely if it left issue surviving, otherwise to accrue to the other shares. If the child survived the twenty-one years it was to take absolutely. "Provided always that the said trustees [of the father's will] shall (if and so far as I can authorise the same) have power from time to time or at any time during the said period of twenty-one years in their absolute discretion to transfer and make over the share or shares for the time being of the appointed funds of any son of mine who shall have attained the age of twenty-one years, or any part of such share or shares, to such son for his own use absolutely." It was held that this proviso was an attempted delegation of the daughter's power of appointment and therefore invalid.

Lord Cozens-Hardy M.R. said (1) that the proviso was an attempt to enable the trustees in their absolute discretion to turn an adult son's contingent interest into an absolute interest. "It is altogether beyond an ordinary power of advancement, as to which there might possibly be some argument." Warrington L.J. said (2): "The words of this power are wide. They are for such interests in such proportions and in such manner in all respects as the donee shall appoint. It may I think be conceded that these words are wide enough to enable the donee to attach conditions affecting either by way of acceleration, defeasance, or otherwise the nature of the interest. . . . . But in my judgment the provision we have to deal with is one of a different nature. It is not even a mere power of advancement which might possibly be said to be so common an incident to such interests as the donee has here created as to be fairly within the words 'in such manner in all respects'—as to this I express no opinion."

The question as to a power of advancement was not before the Court, but both Lord Cozens-Hardy M.R. and Warrington L.J. evidently thought that such a power might have raised different considerations.

In Farwell on Powers, 3rd ed., p. 330, it is stated that

(1) [1915] 2 Ch. 120. (2) [1915] 2 Ch. 122, 123.

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"An absolute appointment under a special power to a trustee for an object with a power of maintenance given to the trustee for the benefit of the object during infancy, would, it is submitted, be good: *In re Greenslade* (1) decides nothing to the contrary (and see *In re Joicey* (2))."

In the present case the widow has appointed the settled property (subject to her own life interest) to her daughter and son in equal shares as tenants in common. That gives them absolute interests. In addition to this she directs that the trustees holding the funds shall have power (but during her life only with her written consent) not, to confer an absolute interest on an appointee contingently entitled, but, to raise part of the share of an absolute appointee and apply the same for her or his advancement education or benefit.

It would be a strange construction to hold that these powers of advancement amount to a delegation of the widow's special powers of appointment, within the authorities. It is true that if the appointees took only contingent interests, the powers of advancement would fall within the principle of *In re Greenslade*. (1) But here we have nothing of the kind. The widow had absolute power to direct in what "manner and form in every respect" her children should take. She has given them absolute interests, and merely provided, following the almost universal practice in settlements, that if the appointees are in need of advancement, and the trustees are willing to make it, she appoints the funds accordingly.

These absolute appointments are perfectly good, and the powers of advancement ancillary thereto are in no sense invalid as a so-called delegation of the widow's special powers.

Solicitor: *Leonard Jessopp Fulton.*

(1) [1915] 1 Ch. 155, 159. (2) [1915] 2 Ch. 115, 120, 122.

G. R. A.

WALL *v.* EXCHANGE INVESTMENT CORPORATION, LIMITED.

C. A. 1925 Nov. 9.

[1925. W. 3033.]

Company—Special Resolution—Vote by Proxy—Objection disallowed by Chairman—Article of Association—Votes not disallowed to be deemed valid for all purposes—Bona fide decision of Chairman final.

An article of association provided that no objection should be made to the validity of any vote except at the meeting at which it was tendered, and that every vote, whether given in person or by proxy, not disallowed at any meeting should be deemed valid for all purposes :—

Held, affirming Romer J., that the decision of the chairman, who, in the bona fide exercise of the power conferred upon him by the article, had refused to disallow a vote by proxy to which objection had been taken at the meeting, was final and would not be reviewed by the Court.

Wall v. *London and Northern Assets Corporation* [1899] 1 Ch. 550 approved.

APPEAL from a decision of Romer J.

The defendant company was incorporated in 1888, and the plaintiff was the holder of ninety-two shares. Art. 58 provided that "no objection shall be made to the validity of any vote excepting at the meeting at which such vote shall be tendered, or at the meeting (if any) to which such meeting shall be adjourned in the regular course of business, and every vote, whether given in person or by proxy, not disallowed at any one of such meetings, shall be deemed valid for all purposes whatsoever."

On August 10, 1925, notices were sent out convening an extraordinary general meeting of the company for August 25, for the purpose of considering and, if deemed advisable, passing a resolution for the voluntary winding up of the company and the appointment of two liquidators; and convening the confirmatory meeting for September 15. The chairman at the meeting on August 25 was Mr. Okell, a Liverpool solicitor, who previously to the meeting had received certain proxies, one of which related to 292 shares and had been given to the chairman by William Timmis, who held a power of attorney from his mother, the registered holder of the shares, as the administratrix of the late holder,

C. A 1925 WALL v. EXCHANGE INVESTMENT CORPORATION.

J. J. Timmis deceased. At that meeting there were 2059 votes, including the 292 votes, in favour of the resolution, and 659 against. The plaintiff took objection at the meeting to the 292 votes being counted on the ground that the power of attorney did not authorize voting by proxy. After the objection had been taken, the chairman refused to disallow the 292 votes, with the result that under art. 58 those votes were to be deemed valid for all purposes. Without those votes, the resolution would not have been carried. At the confirmatory meeting held on September 15, the resolution was duly confirmed. The plaintiff then commenced this action, and moved for an injunction to restrain the defendants from acting upon the resolution.

It appeared from the evidence on the motion that the power of attorney had been entered at the office of the company, which was Mr. Okell's office, and that before the holding of the meeting he had perused the power and had come to the conclusion that the proxy was valid, and that in refusing to disallow the votes he had acted in good faith.

Romer J. refused the motion and the plaintiff appealed.

The appeal was heard on November 9, 1925.

Swords for the appellant. The appellant took objection at the meeting to the admission of these 292 votes, and his grounds of objection were that the proxy involved two delegations of a power; in the first instance, by the administratrix to an attorney, and then by the attorney to the chairman as his proxy.

Art. 58 deals with only one set of circumstances; it deals with a case where a vote is tendered and not disallowed, but it does not deal with cases where a good vote is tendered and disallowed, or where a person not entitled to a vote tenders a vote which is allowed. In the last instance the chairman might confer a vote upon a person not entitled to it. I submit that the article has not the limited application which North J. gave to the precisely similar article in *Wall* v. *London and Northern Assets*

Corporation (1), in which case this appellant was the plaintiff, and that the chairman's ruling ought not to be beyond review by the Court. The chairman could not exercise his power under the article judicially without having seen the power of attorney, and it was not known at the meeting that he had seen it. The article says that a vote not disallowed shall be "deemed" valid for all purposes; the word "deemed" limits the effect of the chairman's ruling and leaves the validity of the vote subject to review by the Court.

Stamp for the respondent liquidators.

POLLOCK M.R. In my opinion this appeal must be dismissed. It raises a short but interesting point as to the powers of the chairman under one of the articles of association of the defendant company. [His Lordship stated the facts and the provisions of art. 58 and continued:] It has been said on behalf of Mr. Wall in a succinct and good argument that art. 58 does not prevent the matter from being reconsidered by the Court, and that Mr. Okell was wrong in the decision at which he arrived. It may perhaps be of service to note that the word "deemed" seems to be necessary, because, if the chairman's discretion or powers are to be wide enough for him to determine the matter, and he does not disallow the votes, they are to stand and to be valid for all purposes whatsoever.

This article has already been considered by North J. in *Wall* v. *London and Northern Assets Corporation* (1), where the article in question was literatim the same as the article in the present case. Objection was taken that there the powers of the chairman were not to be exercised by him so as to prevent the intervention or the reconsideration of the matter by the Court, and that it would be possible to show the Court that the chairman had come to a wrong decision. In that case North J. says this: "The article in question is not of very general application; it does not go to the extent of making the chairman's decision final as to a resolution being passed. If he made a mistake in counting, for instance,

(1) [1899] 1 Ch. 550, 552.

C. A. 1925 WALL v. EXCHANGE INVESTMENT CORPORATION. Pollock M.R.

the article would not apply. All the rule says is that any objections to votes are to be taken at the meetings, ' and every vote not disallowed at any one of such meetings shall be deemed valid for all purposes whatsoever.' That is the same as ' shall be valid,' or ' shall be treated as valid.' " Then he says : " In my opinion, the meaning of the article is that all objections to votes at a meeting must actually be taken and dealt with at the meeting, and the decision as to their validity by the person who presides is to be final on that point." I agree with North J. I do not see the purpose of art. 58 in the present case unless the effect which he has summarized in the sentence which I have read is to be given to it. The chairman is to exercise his power and come to a decision whether votes which are in question shall be disallowed or not. If he comes to that decision regularly and with the limitation which North J. pointed out—namely, that fraud is not suggested—it appears that the action of the chairman cannot afterwards be questioned. He acts in effect as if he was an arbitrator chosen by the parties concerned and whose decision is to bind the parties on the question whether these votes are to be treated as valid votes or not. No suggestion is made here against Mr. Okell that he was guilty of any misconduct, and certainly no suggestion that he was guilty of such conduct as in the case of an arbitrator would invalidate his award. All that is said is that upon further and better inquiry he ought to have come to a different decision. Mr. Okell says he did not deal with the matter lightly, because he had examined the proxy and had come to a conclusion upon it before ever the meeting was held. But, apart from that, it appears to me that, in the absence of any charge of fraud or misconduct which would be sufficient to invalidate the award of an arbitrator, Mr. Okell, as chairman of the meeting, was entrusted with the power under art. 58, and, for the purpose of getting through the business of the meeting, was entrusted with powers which required him to decide whether or not the votes should be disallowed. He has come to the conclusion that they ought not to be disallowed, with the consequence that they are to be deemed to be valid, and

that decision by him cannot now be set aside, because the article makes his decision binding upon the parties who were attending at the meeting.

For these reasons it appears to me that Romer J. came to a right conclusion and that this appeal must be dismissed with costs.

WARRINGTON L.J. I am of the same opinion. The terms of art. 58, in my opinion, are perfectly plain. They leave it to the chairman to say, if an objection is made, whether or not the votes to which objection is taken should be disallowed, and, if he comes to the conclusion that they ought not to be disallowed and, of course, refuses to disallow them, then those votes shall be deemed to be valid for all purposes whatsoever. Without authority I should have come to the conclusion that the action of the chairman, in coming to the decision to which he did come, taken as it was in good faith and after considering whether upon the construction of the power of attorney it did or did not authorize the signature of the proxy, was final and that no objection could be taken to it. But the matter is not free from authority. There is an exactly similar case of *Wall* v. *London and Northern Assets Corporation* (1), which came before North J. on an article in precisely the same terms, and North J. came to the conclusion that, in the absence of any fraud or mala fides, the resolution could not be impeached on the ground that the votes had not been disallowed by the chairman, seeing that the chairman had properly refused to disallow the votes. It seems to me that Romer J. was right in refusing the injunction and that this appeal ought to be dismissed.

I have looked at the power of attorney. To express any opinion upon its construction would be irrelevant, but I will only say that, having perused it, I think it was quite possible for the chairman to come to the conclusion at which he arrived.

SARGANT L.J. I agree. We are in effect being asked to overrule the judgment of North J. given in the year 1899

(1) [1899] 1 Ch. 550.

C. A. 1925 WALL v. EXCHANGE INVESTMENT CORPORATION. Sargant L.J.

with regard to an article in precisely the same terms as the article now before us. I have looked carefully through the decision in view of the criticisms of Mr. Swords, and I think that the decision was right and was founded on justifiable grounds. Here, so far from any fraud or misconduct being put forward as against the chairman, it appears that in the ordinary course of business he examined, before the meeting, the proxies which had been lodged, and he came to the conclusion that the power of attorney in question was sufficient to enable the attorney to record his vote by proxy. In that state of things it seems to me that he was entitled to refuse to disallow the objection to the vote given under the proxy, and therefore the result followed that the vote was valid for all purposes and in the result gave the requisite majority to pass the resolution as a special resolution.

It is obviously desirable that questions of this sort should be determined in a summary way and without the necessity of coming to the Courts. Mr. Swords says that, according to the terms of this article, if the chairman had disallowed a vote, his decision is not conclusive. It may well be that in the case where a vote has been disallowed, the shareholder whose right has been impeached to that extent should have a right to apply to the Courts. Here, all that is done is to take away from a shareholder a right of appeal against a decision disallowing an objection by him against the votes of some other shareholder, and it seems to me quite reasonable that such a question should be allowed to be decided summarily and finally by the chairman, although there should not be the same summary and final effect given to a decision against the right of a shareholder to vote.

Appeal dismissed.

Solicitors for the appellant: *Evans, Jarvis & Sherry.*

Solicitors for the respondents: *Balderston, Warren & Co., for Robert Davies & Co., Warrington.*

R. M.

In re LISTER.

Ex parte BRADFORD OVERSEERS AND BRADFORD CORPORATION.

C. A.
1925
LAWRENCE J.
July 2.

C. A.
Nov. 13, 30.

Bankruptcy—Lease—Disclaimer—Occupation of Premises by Trustee—Liability "in respect of property disclaimed"—Rates—Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 54.

A receiving order was made against the debtor on February 8, 1923, and he was adjudicated bankrupt on February 12, 1923. At the commencement of the bankruptcy—the date of which was December 23, 1922—the bankrupt was the occupier of a small dwelling-house under a verbal tenancy. On February 8, 1923, the Official Receiver, as trustee, entered upon the premises and took possession of the bankrupt's furniture, and remained in occupation until May 15, 1923, when he sold the furniture to the bankrupt's wife, and on June 1, 1923, he disclaimed the tenancy. On April 2, 1923, rates were made on the occupier of the premises in respect of the period between April 2, 1923, and March 31, 1924. The rating authority claimed payment by the trustee of the apportioned amount of the rates in respect of the period he was so in occupation:—

Held, by Lawrence J., that the liability from which a trustee was discharged by s. 54 of the Bankruptcy Act, 1914, was not confined to the liability strictly incident to the vesting in him of the property disclaimed, but included the liability of the trustee in respect of his occupation of the premises to pay the rates, as that liability was one "in respect of the property disclaimed" within the meaning of that section, and that the trustee therefore was not personally liable to pay the rates.

Held, also, that inasmuch as the claim was for rates which had accrued since the bankruptcy and therefore was not provable, the rating authority had no remedy against the assets of the bankrupt in respect of such rates.

Held, by the Court of Appeal (reversing the decision of Lawrence J.), that as the tenancy itself, which was disclaimed, imposed no liability for rates upon the trustee, but that liability was incurred by his voluntary occupation of the premises, the personal liability from which he was discharged by s. 54, although it included liabilities necessarily imposed by or directly flowing from the vesting in him of the property disclaimed, did not include the liability to pay the rates.

Special Case stated by the deputy judge of the Bradford County Court for the opinion of the High Court under s. 100, sub-s. 3, of the Bankruptcy Act, 1914.

The facts appearing from the special case were as follows:—

1. A receiving order in bankruptcy was made against

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Joseph Smith Lister on February 8, 1923, and an order of adjudication was made on February 12, 1923. The petition on which the receiving order was made was presented on January 25, 1923, the act of bankruptcy on which the petition was founded being the failure of the bankrupt to comply with the requirements of a bankruptcy notice served upon him on December 15, 1922. The commencement of the bankruptcy was December 23, 1922.

2. No trustee in bankruptcy was appointed by the creditors, and the respondent as Official Receiver was the trustee of the property of the bankrupt by virtue of the provisions of s. 129 of the Bankruptcy Act, 1914.

3. The liabilities admitted to rank against the estate of the bankrupt amounted to 1584*l.* 16*s.* 8*d.*, and the assets realized by the respondent as trustee amounted to 143*l.* 15*s.* 6*d.*, after payment of costs, charges and expenses under Bankruptcy Rule 117, costs of execution and preferential claims amounting in the aggregate to 91*l.* 0*s.* 8*d.*, leaving a balance of 52*l.* 14*s.* 10*d.* available for dividend.

4. At the commencement of the bankruptcy the bankrupt was the occupier of certain premises known as 26 Merton Road, Bradford, under a quarterly verbal tenancy at a rent of 9*l.* 16*s.* a quarter. The premises consisted of a dwelling-house, and were occupied by the bankrupt for residential purposes only.

5. On February 8, 1923, the respondent entered upon the premises and took possession of the bankrupt's furniture there, and such furniture remained on the premises until May 15, 1923, when the respondent sold the same to Sarah Lister, the wife of the bankrupt, and gave up possession thereof to her. The respondent was entered on the rate book as occupier from April 2 to May 15, 1923, and no appeal was brought against the rate or entry.

6. On June 1, 1923, the respondent filed in the county court of Yorkshire, holden at Bradford, a notice under the provisions of s. 54 of the Bankruptcy Act, 1914, disclaiming the tenancy agreement under which the premises were held.

7. At the date of the receiving order there were due and

payable by the bankrupt to the applicants rates as hereinafter set out in respect of his occupation of the premises, which rates the respondent had admitted to rank against the estate of the bankrupt, as being debts to be paid in priority to the claims of the general body of creditors under the provision of s. 33 of the Bankruptcy Act, 1914.

Date when rate made.	Nature of rate.	Period of rate.	Amount.
April 1, 1922..	Poor rate ..	Feb. 9, 1923, to March 31, 1923 ..	£ s. d. 2 8 8
Do. ..	General district rate ..	Do. ..	15 2
Do. ..	Water rate ..	Do. ..	1 0
			3 4 10

8. On April 2, 1923, rates were made on the occupier of the premises in respect of the period and for the amounts hereinafter set out.

Date when rate made.	Nature of rate.	Period of rate.	Amount.
April 2, 1923 ..	Poor rate ..	April 2, 1923, to March 31, 1924 ..	£ s. d. 18 2 6
Do. ..	General district rate ..	Do. ..	4 14 3
Do. ..	Water rate ..	Do. ..	7 3
			23 4 0

9. Occupier: Joseph Lister.
Amended to: Walter Durrance, Official Receiver, re Joseph Lister, April 2 to May 15, 1923. Sarah Lister from May 16, 1923.
Description: House.
Situation: 26 Merton Road.
Gross estimated rental: 39*l.*
Rateable value: 29*l.*

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Amount of rates at 16*s.* in the £, being poor rate at 12*s.* 6*d.* in the £; general rate at 3*s.* 3*d.* in the £; and water rate at 3*d.* in the £ .. .. 23*l.* 4*s.*

10. The apportioned parts of the said rates for the period from April 2, 1923, to May 15, 1923, during which period the respondent as trustee was so in occupation of the premises, were as follows:—

		£	s.	d.
April 2 to May 15, 1923	Poor rate ..	2	4	8
Do. ..	General district rate		11	7
Do. ..	Water rate ..			11
		2	17	2

11. The said rates and all necessary entries, amendments and notices were duly made and served.

12. On July 14, 1924, the applicants launched a notice of motion in the Bradford County Court claiming from the respondent payment of the sum of 2*l.* 17*s.* 2*d.*, the amount of the apportioned parts of the said rates.

13. On the hearing of the motion questions of law arose, which all parties to the proceedings desired to have determined in the first instance in the High Court.

The questions for the opinion of the Court were: (1.) whether the respondent was personally liable to pay to the applicants the said rates or any and what part thereof; (2.) whether the said rates or any and what part thereof were payable out of the assets in priority to the debts provable; (3.) whether the notice of disclaimer operated to determine: (*a*) the personal liability, if any, of the respondent to pay the said rates or any and which of them as from the date when the premises so disclaimed vested in him, and (*b*) the liability of the estate, if any, to payment in priority; and (4.) whether the applicants had any right to rank for dividend pari passu with the general body of creditors for the said rates or some and what part thereof.

The special case was heard before Lawrence J. on July 2, 1925.

Clauson K.C. and *W. N. Stable* for the applicants. The Official Receiver's liability to pay the proportionate part of the rates claimed is not a liability "in respect of the property disclaimed" within the meaning of s. 54, sub-s. 2 (1), of the Bankruptcy Act, 1914. Sect. 54 deals exclusively with the liability of a trustee by reason of the property of the bankrupt having vested in him as trustee, and does not affect the liability to pay rates, which is a liability arising as a consequence of his having entered into occupation of the bankrupt's leasehold house. Disclaimer under s. 54, only gives relief from liability in respect of the property disclaimed. Rule 276 of the Bankruptcy Rules, 1915, throws some light upon the question. The scheme of the rule is that in certain circumstances an onerous tenancy may be disclaimed without the leave of the Court; but machinery is provided for "persons interested" having notice of the trustee's intention to disclaim. If the disclaimer affects the interest of the rating authority it seems unjust to exclude that authority from the benefit of the rule. That authority is "a person interested" within the scope of the rule, and is entitled to notice: sub-cl. 6 of the rule covers the whole class of persons interested. The area of relief and the

(1) Bankruptcy Act, 1914, s. 54, sub-s. 1: "Where any part of the property of the bankrupt consists of land of any tenure burdened with onerous covenants, of shares or stock in companies, of unprofitable contracts, or of any other property that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money, the trustee, notwithstanding that he has endeavoured to sell or has taken possession of the property, or exercised any act of ownership in relation thereto, but subject to the provisions of this section, may, by writing signed by him, at any time within twelve months after the first appointment of a trustee or such extended period as may be allowed by the Court, disclaim the property. . . . ."

Sub-s. 2: "The disclaimer shall operate to determine, as from the date of disclaimer, the rights, interests, and liabilities of the bankrupt and his property in or in respect of the property disclaimed, and shall also discharge the trustee from all personal liability in respect of the property disclaimed as from the date when the property vested in him, and shall not, except so far as is necessary for the purpose of releasing the bankrupt and his property and the trustee from liability, affect the rights or liabilities of any other person."

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area of affection should correspond: *In re Sandwell.* (1) By entering into possession of the premises which had vested in him the trustee became liable as occupier to the consequences of having done so, without the necessity of electing to take the property: *Wilson* v. *Wallani.* (2) The section is no protection to the Official Receiver against common law liabilities.

Hansell for the respondent. The liability in dispute is "in respect of the property disclaimed," within the precise language of s. 54. The primary object of the relieving sections in all the three Bankruptcy Acts of 1869, 1883 and 1914, is to relieve the bankrupt and his estate from all liabilities attaching to his property when that property is taken away from him. In *Ex parte Walton* (3), a case dealing with the Bankruptcy Act, 1869, Jessel M.R. said: "The object of the Legislature is plain. When a man becomes bankrupt he is not to remain liable to engagements attaching to his property when that property is taken away from him: the Legislature intended to set him free from personal obligations attaching to his property." In *Hill* v. *East and West India Dock Co.* (4) there are observations of Lord Cairns to the same effect, and in *In re Finley* (5), a case dealing with the Act of 1883, Lindley L.J. said: "The effect of the disclaimer, speaking roughly and generally, is plain enough; it is to put an end to both the rights and the liabilities of the bankrupt and his trustee in respect of the disclaimed property." Approaching s. 54 in the light of those judicial observations, the liability was incurred by the trustee by reason of the property vesting in him. True, the liability to pay rates is a consequence of the property being occupied, and the person rateable is the occupier, still that liability is not the less a liability in respect of the property, apart altogether from the question whether the trustee was or was not in occupation. The poor rate is not a tax on the land, but is a personal charge in respect of the land: it is essential

(1) (1885) 14 Q. B. D. 960.
(2) (1880) 5 Ex. D. 155, 163.
(3) (1881) 17 Ch. D. 746, 751.
(4) (1884) 9 App. Cas. 448, 455.
(5) (1888) 21 Q. B. D. 475, 482.

that there should be occupation. It is the occupier who is rateable in respect of the land; it is not the land that is rateable.

In the Poor Rate Exemption Act, 1833 (3 & 4 Will. 4, c. 30), and the Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41), the liability to pay rates is referred to as being "in respect of land, houses or buildings."

LAWRENCE J. This special case raises a short but novel point; and the question stated quite broadly is whether, where a trustee in bankruptcy goes into occupation of an onerous property and subsequently disclaims that property, he gets rid of the liability to pay the rates during the period of his occupation. It seems somewhat startling if his disclaimer has that result, because a trustee is not obliged to go into occupation and his liability to rates only arises by reason of his occupation. Mr. Clauson and Mr. Stable have strenuously contended that s. 54 of the Bankruptcy Act, 1914, which deals with the disclaimer of onerous property, only discharges the trustee from a liability which is incident to the vesting of the property in the trustee and does not apply to any such liability as the liability to rates, which does not attach to the ownership of property which has become vested in the trustee, but only arises if and when the trustee chooses to go into possession. Such a construction seems to me to be reasonable if I could find any such limitation or qualification of the language used in sub-s. 2 of s. 54 as would justify it. The words of that sub-section are: "The disclaimer shall discharge the trustee from all personal liability in respect of the property disclaimed": and the sole point is whether the rates in this case are a personal liability of the trustee "in respect of the property" which he has since disclaimed. I do not see my way to hold otherwise than that the liability in question is a liability in respect of the property disclaimed. The rating authority rates the property which is occupied by the trustee. The property so occupied becomes the rateable hereditament, and it is in respect of the occupation of that rateable hereditament that the personal

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liability of the trustee attaches. In ordinary parlance, that is a liability in respect of the property disclaimed, and I see no warrant for saying that the Court ought to restrict the generality of the words there used. It may not have been foreseen by the Legislature that the consequence would be to relieve a trustee from paying rates in the circumstances of this case, but all that the Court has to do is to construe the Act and the expressions which are to be found there. I think that Mr. Hansell's argument is unanswerable—namely, that the rates are a liability upon the trustee in respect of the property disclaimed, and that within the precise words of sub-s. 2 of s. 54 the trustee is discharged from all personal liability in respect of those rates.

This decision has no doubt a strange result. The rates having accrued during the occupation of the trustee are not, under the statute, payable out of the assets, because such assets are only applicable towards the discharge of the debts provable, and these rates are not provable, because they are claims which have arisen since the bankruptcy. If my decision is right, the rating authority can neither prove nor in any other way get at the assets of the bankrupt for the payment of the rates.

I propose in this case in answer to the questions raised to make the following declaration—namely, first, that the respondent is not personally liable to pay to the applicants the said rates or any part thereof; secondly, that the said rates are not payable out of the assets in priority to the debts provable in the bankruptcy; thirdly, that the notice of disclaimer operated to determine the personal liability of the respondent to pay the rates as from the date when the premises so disclaimed vested in him; and fourthly, that the applicants have no right to rank for dividend for the said rates.

H. C. H,

C. A. The applicants appealed.

Clauson K.C. and *W. N. Stable* for the appellants.

Sir Thomas Inskip S.-G. and *Hansell* for the Official Receiver.

The arguments were substantially the same as those used in the Court below. In addition to the cases there cited *Ex parte Glegg* (1) was also referred to.

Cur. adv. vult.

Nov. 30. The following written judgments were delivered:

POLLOCK M.R. This is an appeal from the decision of Lawrence J. given on July 2, 1925, upon a special case, and the question to be decided, as stated by Lawrence J., is whether where a trustee in bankruptcy goes into occupation of an onerous property, he gets rid of the liability to pay the rates in respect of it during the period of his occupation, by virtue of his disclaimer of the property under s. 54 of the Bankruptcy Act, 1914, and the immunity given to a trustee in bankruptcy under sub-s. 2 of that section.

It is unnecessary to repeat all the facts stated in the special case, but I set out paras. 4, 5, 6 and 10 of it as relevant to this judgment as follows. [His Lordship read the paragraphs and continued:] It is not questioned that the trustee was entitled to exercise his powers of disclaimer under s. 54 in respect of the agreement of tenancy under which the dwelling-house was held by the bankrupt.

As the special case finds, the trustee entered upon the premises, took possession of the furniture, and allowed himself, without raising an appeal, to be entered on the rate book as occupier of No. 26 Merton Road, with the result that the demand for the 2*l.* 17*s.* 2*d.* in question in the case, which includes a small sum for water rate, was made upon him. The trustee, however, claims immunity from the payment of this total sum by reason of the words in sub-s. 2, "that the disclaimer . . . . shall also discharge the trustee from all personal liability in respect of the property disclaimed as from the date when the property vested in him" —that date being fixed by s. 53, sub-s. 2, and being in the present case February 12, 1923: that is, antecedent to the date at which the liability now sought to be enforced arose.

(1) (1881) 19 Ch. D. 7.

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Lawrence J. decided in favour of the trustee. He appreciated that his decision may involve some startling results, but felt unable to cut down the apparent meaning of the large and comprehensive words to which I have referred. I have come to a different conclusion, but not without some doubt.

The present s. 54, sub-s. 1, re-enacts s. 55, sub-s. 1, of the Bankruptcy Act of 1883, with the addition of a power to extend the time for disclaimer. By sub-s. 8 any person injured by the disclaimer may prove as a creditor of the bankrupt to the extent of the injury he has suffered; for the purpose of the disclaimer is to relieve the bankrupt and his estate, and his trustee from liability arising out of the property disclaimed, but not to affect the rights and liabilities of third parties in relation to the property disclaimed: see *Ex parte Walton.* (1) It is to be observed that in the present case, if the trustee is relieved from liability, it is, to say the least, doubtful whether the overseers would be able to recover the rates from the bankrupt's estate under this sub-section. Now the word "property" appears to be used in s. 54 with different significations in different places in the section. In the first line "property" connotes the same property which passed to the trustee under the operation of s. 53, which vests all the property of the bankrupt in the trustee; but in sub-s. 2 the disclaimer operates to discharge the bankrupt and "his property"—that is his assets—from liability: see per Lindley L.J. in *In re Finley* (2), and see later on where he says (3): "It is sometimes used to denote the thing owned—the land or shares or whatever it may be; it is sometimes used to denote the bankrupt's interest in the thing, whatever it may be; and it is sometimes used, apparently indiscriminately, to denote both of those things. There is an ambiguity in the expression."

Attention has been called to a number of statutes dealing with rating where the liability to pay rates is spoken of as "in respect of land, houses or buildings." That may be so; but no liability in respect of land, houses or buildings

(1) 17 Ch. D. 746. (2) 21 Q. B. D. 475, 482.
(3) Ibid. 484.

arises except to an occupier in respect of his occupation. Occupation is the foundation of the liability, so that the similarity of the words used in sub-s. 2, "personal liability in respect of the property disclaimed," does not appear to afford a helpful test as to a liability which does not arise under a rating Act without something more, that is occupation. Moreover, inasmuch as occupation is the test, it is questionable whether if the overseers were relegated to a proof in bankruptcy, they would recover these rates for a period during which the bankrupt was not in occupation.

Now it has been held, and I think rightly, in *Schofield* v. *Hincks* (1), that these words under which immunity is claimed for the trustee do not enure to cover a wrongful act committed by the trustee in selling hay and straw grown on a farm of a bankrupt tenant, in breach of his agreement, although the trustee disclaimed the lease under which the restriction arose. It is clear that some limit must be placed upon the immunity of the trustee: and where, as here, the act under which his liability arises does not fall upon him merely on account of the "property" passing to him, but is one of his own volition, and not essential to the preservation of the assets—however prudent the act may have been—it is difficult to suppose that the Legislature intended that the trustee was to be relieved. The words in sub-s. 1, "notwithstanding that he has endeavoured to sell or has taken possession of the property, or exercised any act of ownership in relation thereto," appear to me to free the trustee from consequences which might be suggested where his act has been done entirely for the purposes of the estate and its realization.

For these reasons, though, I repeat, not without doubt, in my judgment the trustee seeks an interpretation of sub-s. 2 beyond what it is intended to cover, and the questions put in the special case must be answered: as to (1.) in the affirmative, and (3.) (*a*) in the negative, in respect of the full amount claimed—namely, 2*l*. 17*s*. 2*d*. The appeal will be allowed with costs.

(1) (1888) 37 W. R. 157.

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ATKIN L.J. The facts of this case are stated in the special case. All that need be mentioned for the purpose of this judgment is that the debtor at the date of the commencement of the bankruptcy was occupying under a verbal quarterly agreement of tenancy a house in Merton Road, Bradford, in which was his furniture. His property, therefore, included the agreement of tenancy, which became vested in the respondent, the Official Receiver for the district, as his trustee in bankruptcy pursuant to ss. 129 and 53 of the Bankruptcy Act, 1914. The respondent went into occupation of the premises apparently by taking possession of the furniture, leaving them there for safe custody and appointing the debtor and his wife caretakers. The rates on the house being yearly rates had been made from April 1 to March 31, and being due at the date of the receiving order have been admitted to rank in priority in pursuance of s. 33 of the Act of 1914. Why the amount stated in the special case as so ranking is limited to the period from adjudication to the end of the current period I do not know and have not inquired. From April 2, 1923, the respondent was entered on the rate book as occupier. He has not appealed, and it is to be taken that he was properly so entered and became personally liable for rates as long as his occupation continued. On May 15 he sold the furniture to the debtor's wife, and apparently then ceased to occupy the premises. On June 1 he gave notice under s. 54 of the Act that he disclaimed the tenancy. The local authority claim from him 2*l.* 17*s.* 2*d.*, being the apportioned rates for the period of his occupation from April 2 to May 15. The particular rates are the poor rate, general district rate and water rate. The respondent claims that his liability to pay the rates in question is "a personal liability in respect of the property disclaimed," and that he is discharged from it under sub-s. 2 of the disclaimer section, s. 54.

I have come to the conclusion that this contention is wrong. It is necessary in the first place to ascertain what is the property disclaimed. This seems plain from the words of the section and the notice of disclaimer. The Official

Receiver had the right to disclaim, because the particular property of the debtor was property "unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money," or it may be also because it was an "unprofitable contract." The property so described was not the house, but the tenancy agreement; and the notice of disclaimer which forms part of the case quite correctly disclaims the "tenancy."

The question, therefore, is whether the respondent's liability to pay rates arose in respect of the tenancy which he disclaims. The learned judge in his judgment appears to have treated the property disclaimed as the house, the hereditament; and this appears, with respect, not to be accurate. If then one considers whether the liability in question is a liability in respect of the tenancy, the answer appears to me to be reasonably plain. The words "in respect of" may be of very wide import. In their widest sense it may be said that the liability arises in respect of the tenancy, because unless the respondent had the right to occupy under the tenancy he probably would not have gone into occupation. But to give this wide connotation to the words would be to extend the relief given in the section beyond reason. If the respondent being in occupation had employed a builder to repair the roof or make other necessary repairs in this wide sense the obligation might arise in respect of the tenancy, for it was similarly under the tenancy that he obtained the right to interfere with the roof. But it could not be contended that the subject relieved the trustee from such obligations. So if the occupier became liable in tort to an invitee or to a passer by on the highway by reason of the state of the premises; or if he as occupier incurred liability for infringing by-laws. It appears to me that the words must be given some reasonably restricted meaning, and giving them the widest reasonable connotation I think they do not include a liability which does not flow directly from the property disclaimed, but is the result of a voluntary act done by the trustee. The tenancy itself imposed no

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liability for rates upon the trustee; nor did the property in the furniture, nor the duty imposed by s. 48, sub-s. 1, to take possession of the furniture. He might have sold the furniture forthwith, or warehoused it. If he had taken a shed or house in which to store the furniture he would clearly be personally responsible for the rates on such shed or house, and I see no reason why, if he chooses to use the debtor's house as a store, which he had the right to do, his position is any different. Whether he acquires a right under a new contract or avails himself of a contractual right vested in him, his liability appears to me to arise in respect of his own act; and in the latter case not to arise in respect of the contractual right of which he might or might not avail himself.

It may be noted that part of his liability in question is for water rate. There appears to have been some further question as to water rates, which is not the subject of dispute in this case; and it is possible that the rate does not cover the whole of the charges for water supplied to the house. I do not know the terms of the Bradford Corporation's statutory powers; but if they are in ordinary form they would not include the right to charge unless water were supplied to the house. If the respondent for his own or his caretaker's convenience chooses to have water supplied to the house, is there any reason why he should be discharged from payment for it? If the charge were for gas supplied I can imagine no dispute would be raised, and yet in the wide sense contended for the gas would equally be supplied in respect of the tenancy. Our attention was called to the words of the section, which enables the trustee to disclaim, notwithstanding that he has "endeavoured to sell or has taken possession of the property, or exercised any act of ownership." I think that those words are merely intended to defeat any possible contention that the acts suggested amount to a final election to hold the property so as to fetter the right to disclaim. They cannot involve the consequence that liabilities incurred in doing any of the acts mentioned are to be taken to be liabilities in respect of the property

eventually disclaimed. If it were so, liabilities incurred to the printer in respect of advertisements, the auctioneer or house agent instructed to sell, the builder in repairing, would fall within the section.

It is not necessary, and perhaps inadvisable, to discuss what the precise scope of the words in sub-s. 2 is. They plainly cover liabilities necessarily imposed by the vesting of the property disclaimed, such as liability to perform the covenants of a lease, or to pay calls on shares, or to give or pay for delivery of goods on contracts. There may be liabilities which directly flow from the property when vested which would also be covered. But they do not cover liabilities which the trustee voluntarily incurs, even though in doing so he is acting with prudence and in fulfilment of his duties to the estate.

The argument for the respondent asked us to consider the public disadvantages of this decision as affecting trustees in bankruptcy. I have not thought it necessary to weigh the advantages or disadvantages further than was necessary to construe the statute. But it has to be remembered that the trustee is not bound to go into rateable occupation of any property, and that under ordinary circumstances the rates are provided for by s. 33 for the current period of a rate. On the other hand the period of disclaimer may be as long as twelve months or even longer if extended by the Court, and I can see no urgent claim of public policy which requires a trustee in bankruptcy to have beneficial occupation of rateable hereditaments without making a contribution to the expenses which benefit him just as much as any ordinary occupier.

I think that the appeal should be allowed and the order below discharged, and that the first question should be answered in the affirmative and the third in the negative. There appears to be an arrangement as to costs which presumably covers the costs of the appeal. There should be leave to appeal.

SARGANT L.J. In this case Lawrence J. has realized the strangeness of the result at which he has arrived; but he

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has felt himself unable to disregard what he characterizes as the precise wording of sub-s. 2 of s. 54 of the Bankruptcy Act, 1914. The crucial part of his reasoning is to be found in the following passage—namely, "The rating authority rates the property which is occupied by the trustee. The property so occupied becomes the rateable hereditament, and it is in respect of the occupation of that rateable hereditament that the personal liability of the trustee attaches. In ordinary parlance that is a liability in respect of the property disclaimed, and I see no warrant for saying that the Court ought to restrict the generality of the words there used."

Now, with great respect to the learned judge, I think that he has not sufficiently distinguished between the hereditament itself, No. 26 Merton Road, and the interest in that hereditament, which formed the property of the bankrupt, and was alone capable of vesting in the trustee and of being the subject of a disclaimer by him. The terms of the disclaimer itself recognize the very limited nature of the property to which it applies. It is a disclaimer not of No. 26 Merton Road, that is, of the rateable herditament itself, but of the bankrupt's quarterly tenancy of the house at a stated rent; and the discharge of the trustee effected by sub-s. 2, "from all personal liability in respect of the property disclaimed," is, in my judgment, a discharge from all personal liability in respect not of the hereditament generally, but merely of the quarterly tenancy that has passed from the bankrupt to the trustee by virtue of the vesting effected by s. 53, sub-s. 2, of the Act.

Stress has been laid for the respondent on the words in sub-s. 1 of s. 54: "notwithstanding that he has endeavoured to sell or has taken possession of the property, or exercised any act of ownership in relation thereto"; and it has been urged that these words protect the trustee here, because his entering into occupation was merely taking possession. But this argument again seems to miss the true purpose and effect of these words. They are, in my judgment, intended to provide for cases where the trustee is uncertain whether a particular interest of the bankrupt is beneficial or

onerous; and to enable the trustee to take possession of the interest, and endeavour to dispose of it to advantage, without being estopped by this conduct from subsequently disclaiming the interest should it turn out to be not merely valueless but onerous. The words clearly relate to the conduct of the trustee with reference to what vests in him, that is in this case the tenancy of the house. I can see no sufficient reason for extending them so as to include also any other conduct of the trustee in relation to the house.

A hypothetical case such as would not be uncommon in London may perhaps be taken by way of illustration. Assume that a house when built had been leased by the freeholder to A. for ninety-nine years at a ground rent of 2*l.*; that A. had then sub-leased to B. for ninety-nine years less a day at an improved rent of 7*l.*; that some ten years after B. had, in consideration of a premium, sub-leased to C. for fifty years at 50*l.*; and that shortly afterwards C. had granted an occupation lease to D. at 120*l.* Then D., whilst still in possession, acquires the original ground lease to A. and becomes bankrupt. It seems to me unquestionable that D.'s trustee in bankruptcy could deal quite separately and independently with the two properties of D. in the house—namely (*a*) the ground lease entitling the owner to an improved leasehold ground rent of 5*l.* per annum, and (*b*) the occupation lease at 120*l.*; and that he might disclaim the latter lease if onerous without in any way affecting his right to retain and dispose of the clearly beneficial interest under the original ground lease. But on the construction that the learned judge has put on the section, the contrary result would ensue; the right and liabilities of the trustee under the ground lease as being in respect of the property disclaimed—namely, the house—would also be determined. In my judgment this example demonstrates the inadmissibility of this construction.

The use throughout s. 54 of the words "disclaim" and "disclaimer" is in itself a strong indication of the scope of the section. The words, in my view, connote a renunciation of, or refusal to claim, rights or property which would automatically devolve on or accrue to the person making

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the disclaimer. They are precisely applicable to a renunciation of a property which with all its rights, interests and liabilities has vested in the trustee under s. 53, sub-s. 2, of the Act. They are not appropriate to any interests, rights or liabilities that have been acquired or undertaken by the voluntary act of the trustee himself, and independently of devolution of the bankrupt. "Disclaime, disclamare . . . . signifieth utterly to renounce. . . .": Co. Litt. 102*a*; and for other references see Stroud's Judicial Dictionary, 2nd ed., vol. i., p. 539. And the word is habitually used in this sense at the present day with reference to the non-acceptance or renunciation of the office and estate of a trustee under a deed or of an executor and trustee under a will. It is true that, whereas such a renunciation in the case of a deed or will has to be of the totality of the office and estate and ab initio, the Bankruptcy Act places the trustee in bankruptcy in an exceptional position, by enabling him to disclaim one or more items only of the property devolving on him, and to do so after acts of taking possession or attempting to realize which would or might under the general law preclude any subsequent disclaimer. But I can see no sufficient reason for further extending this special privilege beyond rights and liabilities in respect of assets which have necessarily devolved upon the trustee by virtue of the statutory vesting in him, and for applying it to any interests, rights or liabilities which are the result, not of the statutory vesting, but of his subsequent voluntary action. For such actions he remains personally responsible.

I agree that the appeal should be allowed with costs in this Court.

Appeal allowed.

Solicitors for appellants: *Torr & Co., for N. L. Fleming, Town Clerk, Bradford.*

Solicitor for respondent: *Solicitor to Board of Trade.*

W. I. C.

In re WETHERED.

Ex parte SALAMAN.

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Oct. 19; *Nov.* 16.

Bankruptcy — Reputed Ownership — Debt due in Course of Business at Commencement of Bankruptcy — Judgment Debt — Assignment for Value of Judgment and another Business Debt — Agreement to accept Payment by Instalments with Deposit of Promissory Notes—Transaction by Bankrupt for valuable Consideration before Receiving Order—Bankruptcy Act, 1914 (4 & 5 *Geo. c.* 59), *s.* 38, *sub-s.* (*c*), *s.* 45.

S., a customer of the bankrupt, who was a stockbroker, became indebted to him in respect of Stock Exchange transactions in a sum for which the bankrupt, on December 18, 1923, recovered judgment. Later, S. became similarly indebted to the bankrupt in a further sum. On January 15, 1924, the bankrupt assigned both debts to O. W., to secure 500*l.*, and covenanted with him that, in the event of his refraining from giving notice of the assignment to S., the debtor, he (the bankrupt) would, on payment of the debts or any part thereof, hand the cheque or other form of payment to O. W. On February 27, 1924, the bankrupt committed an act of bankruptcy. In March, 1924, J., who acted as solicitor for both the bankrupt and O. W. in the matter of the assignment, on the instructions of both and without disclosing the same, made an agreement with S. for the liquidation of the two debts, whereby S. undertook to pay the aggregate amount thereof by monthly instalments, the first instalments being allocated to the payment of the later of the two debts and the subsequent ones to the payment of the judgment debt; and S. further agreed to deliver promissory notes payable to the bankrupt or order to cover the instalments allocated to the later debt. J. received the notes from S. and, as the agent of O. W., collected the amounts as they fell due on the notes and paid part thereof to O. W. and retained the balance. After payment J. returned the notes to S. to be cancelled. At that time neither J. nor O. W. nor S. had notice of any available act of bankruptcy. On September 18, 1924, a receiving order was made, at which date S. had paid and O. W. had received from J. sums amounting to 90*l.* in respect of the later debt. Upon receiving notice of the receiving order, J. gave notice to S. of the assignment. On September 25, 1924, an order of adjudication was made, and on October 7, 1924, the applicant was appointed trustee.

In April, 1925, O. W. died and his executor was made a respondent to the motion by which a declaration was sought that the two debts were at the commencement of the bankruptcy in the order and disposition of the bankrupt and property of the bankrupt divisible amongst his creditors, within s. 38, sub-s. (*c*), of the Bankruptcy Act, 1914:—

Held, first, that the earlier debt, which, admittedly, arose in the course of the bankrupt's business, was, notwithstanding its conversion into a judgment debt, none the less at the commencement of the bankruptcy a debt due in the course of his business and in the order and disposition of the bankrupt within s. 38, sub-s. (*c*), and therefore divisible amongst his creditors.

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Held, secondly, that the agreement between the bankrupt and S. and the deposit of the notes by the bankrupt with O. W. having been effected after the commencement of the bankruptcy—in the absence of knowledge on the part of either S. or O. W. of an available act of bankruptcy and the Court inferring an agreement by O. W. with the bankrupt, in consideration of the deposit of the notes, not to enforce payment of the advance so long as S. paid the amounts as and when they fell due—constituted valid transactions for valuable consideration within s. 45 of the Bankruptcy Act, 1914. Further, that, apart from such inference, the forbearance of O. W. on the strength of the deposit of the notes, to sue and his acceptance of the instalments constituted sufficient consideration for the deposit of the notes: *Wigan* v. *English and Scottish Law Life Assurance Association* [1909] 1 Ch. 291.

Held, lastly, that even if the trustee was not entitled to recover the instalments paid after the date of the receiving order, the amount paid before that date was a payment protected by s. 45, sub-s. (*b*).

It was, accordingly, declared that the judgment debt formed part of the property of the bankrupt divisible amongst his creditors, while the claim in respect of the other debt was dismissed.

MOTION.

The relevant facts (which are taken from the judgment of the Court) are as follows: the bankrupt was a stockbroker, carrying on business in the City of London. He had a customer named Saunders who became indebted to him in respect of Stock Exchange transactions. On December 18, 1923, the bankrupt recovered judgment against Saunders for 903*l.* 1*s.* In addition to this indebtedness Saunders became indebted to the bankrupt in the sum of 316*l.* 10*s.* 2*d.* representing the balance on the mid-December, 1923, Stock Exchange account.

In January, 1924, the bankrupt borrowed the sum of 500*l.* from his cousin, the late Oliver Wethered. As a security for this loan the bankrupt executed an assignment in favour of Oliver Wethered dated January 15, 1924, of the two debts of 903*l.* 1*s.* and 316*l.* 10*s.* 2*d.* owing by Saunders. The assignment contained a covenant by the bankrupt with Oliver Wethered that, in the event of the latter refraining from giving notice to Saunders of the assignment, the bankrupt would, on receiving payment of the debts, or any part of them, immediately hand the cheque or any other form of payment to Oliver Wethered. An understanding had been arrived at between the bankrupt and Oliver Wethered that the latter

should not give notice of the assignment, unless absolutely necessary for his protection.

Both Oliver Wethered and the bankrupt were clients of Mr. Percy Edgar Jeffs (a member of the firm of Messrs. Bingham & Co., solicitors), and Mr. Jeffs acted for both parties in the negotiation of the loan of 500*l.* and in the preparation and execution of the assignment of January 15, 1924. Acting on the understanding between the bankrupt and Oliver Wethered, Mr. Jeffs abstained from giving notice to Saunders of the assignment, and no such notice was in fact given prior to the receiving order.

On February 27, 1924, the bankrupt committed an act of bankruptcy by not complying with a bankruptcy notice, and on the same day the bankruptcy petition, upon which the receiving order was ultimately made, was filed.

In March, 1924, Mr. Jeffs, on the instructions of both Oliver Wethered and the bankrupt, made an agreement with Saunders' solicitors as to the liquidation of Saunders' two debts, the terms of which agreement appeared from three letters passing between Mr. Jeffs' firm and Saunders' solicitors, dated March 5, 6, and 31, 1924. The substance of this agreement was as follows: Saunders was to pay the aggregate amount of his two debts and Mr. Jeffs' costs by the following monthly instalments payable on the 14th day of each month—namely, 15*l.* a month up to September 14, 1924, 20*l.* a month thereafter up to June 14, 1925, and 25*l.* a month thereafter, until the total amount was paid off. The first eighteen instalments and 18*l.* 1*s.* 3*d.*, part of the nineteenth instalment, were to be allocated to the payment of Mr. Jeffs' costs, which had been agreed at 36*l.* 11*s.* 1*d.*, and then to the payment of the debt of 316*l.* 10*s.* 2*d.*, amounting in the aggregate to 353*l.* 1*s.* 3*d.*, and the remainder of the instalments were to be allocated to the payment of the judgment debt of 903*l.* 1*s.* The first instalment of 15*l.* was to be paid in cash, and in order to cover the remaining eighteen instalments allocated to Mr. Jeffs' costs and to the debt of 316*l.* 10*s.* 2*d.*, amounting to 338*l.* 1*s.* 3*d.* Saunders was to make and deliver eighteen promissory notes payable to the bankrupt "or order" as follows: six notes

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of 15*l.*, nine notes of 20*l.*, two notes of 25*l.*, and one note of 18*l.* 1*s.* 3*d.* In the event of any instalment not being paid, the whole of the balance was immediately to become payable. At the date when this agreement was come to, the understanding between the bankrupt and Oliver Wethered as to not giving notice of the assignment of January 15, 1924, was still in force, and Mr. Jeffs, with the knowledge and assent of Oliver Wethered, conducted and concluded the negotiations with Saunders' solicitors in the name of the bankrupt without disclosing the assignment.

At this time Mr. Jeffs was not aware that the bankrupt had committed an act of bankruptcy, or that a bankruptcy petition had been filed against him. Oliver Wethered having died before the hearing of the motion could not of course be called to deny knowledge or notice, but the Court drew the inference that he at this time was also unaware of the act of bankruptcy and of the filing of the bankruptcy petition.

On the conclusion of the agreement with Saunders the eighteen promissory notes were sent by Saunders' solicitors to Mr. Jeffs, who handed them to Oliver Wethered and told him to get the bankrupt to endorse them. Oliver Wethered, however, at once handed the promissary notes back to Mr. Jeffs with instructions to collect them on his behalf, telling Mr. Jeffs that he would ask the bankrupt to call at Mr. Jeffs' office to endorse them. As the bankrupt failed to call, Mr. Jeffs some time later rang him up on the telephone and asked him to come to his office and endorse the notes, which he promised to do. In spite of this promise, however, the bankrupt did not call, and the promissory notes were never in fact endorsed by him. Saunders paid the amount of each promissory note, when it fell due, to Mr. Jeffs who, after first satisfying his costs out of the moneys so received, paid a portion of the remainder over to Oliver Wethered. Mr. Jeffs stated in the witness box that, as between the bankrupt and Oliver Wethered, he had received these moneys (except in so far as they represented his costs) on behalf of Oliver Wethered and not on behalf of the bankrupt. On the payment of the amount of each promissory note

Mr. Jeffs returned the note which had been so discharged to Mr. Saunders for cancellation.

On September 18, 1924, a receiving order was made against the bankrupt on the petition which had been filed on February 27, 1924, which latter date was the date of the commencement of the bankruptcy.

At the date of the receiving order Saunders had paid and Oliver Wethered had received from Mr. Jeffs sums amounting in the aggregate to 90*l.* in respect of the debt of 316*l.* 10*s.* 2*d.*

Neither Mr. Jeffs nor Oliver Wethered knew or had notice that the bankrupt had committed an act of bankruptcy, or that a bankruptcy petition had been filed against him, until the receiving order was advertised in The Times of September 24, 1924, and thereupon Mr. Jeffs at once gave notice to Saunders of the assignment of January 15, 1924.

On September 25, 1924, an order for adjudication was made, and on October 7, 1924, the applicant was appointed trustee, which appointment was on October 11 duly certified by the Board of Trade.

Oliver Wethered died in the month of April, 1925, and the respondent was his legal personal representative.

On August 28, 1925, the trustee launched this motion, claiming a declaration that the two debts comprised in the assignment of January 15, 1924, were at the commencement of the bankruptcy in the order or disposition of the bankrupt in his business by the consent and permission of the true owner under such circumstances that the bankrupt was the reputed owner thereof, and, therefore, formed part of the property of the bankrupt divisible amongst his creditors. At that date the amounts of the first seventeen promissory notes had been paid to Mr. Jeffs, and subsequently on September 18, 1925, the amount of the eighteenth promissory note for 18*l.* 1*s.* 3*d.* which fell due on September 14, 1925, was paid to Mr. Jeffs.

Of the moneys so received by Mr. Jeffs in respect of the debt of 316*l.* 10*s.* 2*d.* he had paid to Oliver Wethered the sum of 164*l.* 10*s.* 2*d.* and had in hand the balance.

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Edward Clayton K.C. and *G. H. Beyfus* for the trustee. No notice of the assignment of the debts was given to Saunders, the debtor; therefore, the debts were not at the commencement of the bankruptcy taken out of the order or disposition of the bankrupt: *Rutter* v. *Everett* (1); *In re Neal.* (2) The judgment recovered in December, 1923, did not change or affect the character of the debt; it was, at the commencement of the bankruptcy, in spite of the judgment, a debt due to the bankrupt in the course of his business, within the meaning of the exception from things in action referred to in s. 38, sub-s. (*c*), of the Bankruptcy Act, 1914. As to the other debt, the effect of its payment being secured by the promissory notes was merely to postpone the remedy. The deposit of the notes did not alter the original character of that debt. It was still a debt due in the course of the bankrupt's business.

Jenkins K.C. and *Tindale Davis* for the respondent. The earlier debt was taken out of the operation of s. 38 as soon as it became a judgment debt in December, 1923. It was, no doubt, in its origin a "debt due to the bankrupt, in the course of his business"; but at the commencement of the bankruptcy it had become extinguished in the judgment and was a debt of record, and thenceforth ceased to be in the order or disposition of the bankrupt. As to the other debt; after the agreement with Saunders and the deposit by him of the promissory notes, an action did not lie to enforce payment of the original debt, but only to enforce payment under the notes. They were negotiable instruments, but never in the possession of the bankrupt: they were in the hands of Mr. Jeffs, as agent for Oliver Wethered, and therefore were in the possession of Oliver Wethered. To bring the notes within the order or disposition of the bankrupt, it was necessary that they should be in the sole possession and sole reputed ownership of the bankrupt: Williams' Bankruptcy Practice, 13th ed., p. 272.

[LAWRENCE J. But the debt in question was at the commencement of the bankruptcy in the order or disposition of the bankrupt within s. 38.]

(1) [1895] 2 Ch. 872. (2) [1914] 2 K. B. 910.

That we admit. But the agreement by the bankrupt with Saunders and the deposit of the notes by Saunders without notice of any available act of bankruptcy constituted a dealing or transaction for valuable consideration between the bankrupt and Oliver Wethered protected by s. 45 of the Bankruptcy Act, 1914, which the respondent as well as Mr. Saunders is entitled to take advantage of. The bankrupt having received the notes from Saunders as security for the debt on the instructions of Oliver Wethered, made them over to Jeffs as agent to hold them for Oliver Wethered, neither of whom had knowledge of any available act of bankruptcy. Valuable consideration was given by Oliver Wethered for the notes, seeing that he accepted payment by instalments and undertook not to enforce payment of the sum he had advanced to the bankrupt, provided the instalments were duly paid. In order to bring goods within the order or disposition clause in the Act, the consent of the true owner is essential. The true owner was Oliver Wethered, who took the notes out of the possession of the bankrupt: *Graham* v. *Furber*. (1)

In any event, the amount of the instalments paid to Oliver Wethered before the date of the receiving order is protected by s. 45, sub-s. (*b*), of the Bankruptcy Act, 1914.

Clayton K.C. in reply. The agreement was entered into by the bankrupt not with Oliver Wethered but with Saunders, the debtor. There was no agreement or dealing between Oliver Wethered and the bankrupt within the protection of s. 45, sub-s. (*d*). Moreover it was an agreement which merely affected the mode of liquidating the debt, that is to pay it off by instalments, and to secure payment by the notes. If there was an agreement with Oliver Wethered, there was no consideration moving from him. A past consideration is no consideration, unless time is given: *Wigan* v. *English and Scottish Law Life Assurance Association*. (2) Further, it has not been proved that Oliver Wethered had no notice of an act of bankruptcy; the onus of proving absence of such notice lies upon the trustee: Williams' Bankruptcy Practice, 13th ed., p. 324.

(1) (1853) 14 C. B. 134. (2) [1909] 1 Ch. 291, 297.

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In order to bring the transaction within the protection of s. 45, sub-s. (*d*), it must not be one which is contrary to the bankruptcy laws; here, the maker of the notes was to be kept ignorant of the arrangement. The notes were in fact never negotiated, as they were not endorsed according to the requirements of s. 31, sub-s. 3, of the Bills of Exchange Act, 1882: see Byles on Bills, 18th ed., p. 152.

LAWRENCE J. [after stating the facts as above set forth continued as follows:] The first question which arises for determination is whether the judgment debt of 903*l.* 1*s.* forms part of the property of the bankrupt divisible amongst his creditors or whether it belongs to the respondent as part of the estate of Mr. Oliver Wethered, deceased. The solution of this question turns entirely upon whether or not this judgment debt was a debt due to the bankrupt in the course of his business. If it was, it is not disputed that it was, at the commencement of the bankruptcy, in the order or disposition of the bankrupt in his business, by the consent and permission of the true owner, under such circumstances that the bankrupt was the reputed owner thereof.

It is contended that Saunders' original indebtedness, which admittedly arose in the course of the bankrupt's business, was extinguished by the judgment which the bankrupt obtained, and that the debt owing on such judgment cannot properly be termed a debt due to the bankrupt in the course of his business. I confess to having had considerable difficulty in appreciating the grounds for this contention. No doubt the reason for the distinction drawn in s. 38, sub-s. (*c*), of the Bankruptcy Act, 1914, between debts due to a bankrupt in the course of his business and the bankrupt's other choses in action, is, because a bankrupt is more likely to obtain credit in his business on the faith of the former than on the faith of the latter. For the purpose of ascertaining whether any particular debt sustains the character of a debt due to a bankrupt in the course of his business within the meaning of s. 38, sub-s. (*c*), it seems to me that the relevant inquiry is not whether the debt is a simple contract debt or a judgment debt, but whether the

debt is one which is due to the bankrupt in respect of a transaction entered into by him in the course of his business. In my judgment the fact of obtaining a judgment against a debtor who owes money in respect of a business transaction, although it converts his indebtedness into a judgment debt, does not change the character of his indebtedness from a debt due to the bankrupt in the course of his business to a debt due to the bankrupt not in the course of his business. The basis of the judgment is an indebtedness arising out of a transaction in the course of business, and, therefore, it seems to me that the judgment debt is just as much a debt in the course of business as the original debt upon which it is founded. I am of opinion, therefore, that the judgment debt of 903*l.* 1*s.* is a debt due to the bankrupt in the course of his business, and forms part of the property of the bankrupt divisible amongst his creditors.

As regards the debt of 316*l.* 10*s.* 2*d.* an altogether different and, in my opinion, more difficult question arises for decision.

It is admitted by the respondent that this debt was due to the bankrupt in the course of his business, and that at the commencement of his bankruptcy, it was in the order and disposition of the bankrupt in his business, by the consent and permission of the true owner, under such circumstances that he was the reputed owner thereof. It is, however, contended that the making and delivery of the promissory notes by Saunders, coupled with the deposit of such notes by the bankrupt with Oliver Wethered, had the effect of taking the amounts of such notes out of the reputed ownership clause of the Bankruptcy Act. If the notes had been made, delivered, and deposited before the commencement of the bankruptcy, I think that the amounts thereof would not have been in the order and disposition of the bankrupt within s. 38, sub-s. (*c*), as it is settled law that a debt owing on a negotiable instrument does not come within that section, because the legal title to the debt passes by the delivery of the negotiable instrument without notice to the debtor. Moreover had the deposit of the notes with Oliver Wethered as a security for the debt taken place before the commencement of the bankruptcy

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such a deposit undoubtedly would have operated to give him a good equitable charge on the notes which he could have enforced against the bankrupt and his trustee: see *Ex parte Price.* (1)

In the present case, however, the question arises whether the agreement between the bankrupt and Saunders, and the subsequent deposit by the former of the notes with Oliver Wethered, constituted valid transactions as against the trustee in bankruptcy in view of the fact that they were entered into after the commencement of the bankruptcy. The trustee has not hitherto attacked the agreement with Saunders, indeed, on this motion he is, in a way, seeking to obtain the benefit of it. Saunders, apparently, had no notice of an available act of bankruptcy committed by the bankrupt, when he entered into the agreement and when he made and delivered the notes. Therefore, if attacked, he could presumably avail himself of the protection afforded by s. 45 of the Bankruptcy Act, 1914.

In these circumstances the respondent contends that the deposit by the bankrupt of the notes with Oliver Wethered (who also had no notice of an available act of bankruptcy) was a transaction for valuable consideration within s. 45, and that he too is entitled to avail himself of the protection afforded by that section. In my opinion this contention is well founded. In the circumstances, the deposit of the promissory notes amounts clearly to a transaction for valuable consideration. Leaving out the consideration afforded by the mere existence of the advance, there is in this case, I think, sufficient evidence which entitles me to infer that there was an agreement, at all events, to postpone enforcing the debt owing by the bankrupt to Oliver Wethered entered into on the part of Oliver Wethered at the time of the deposit of the notes. Even if it were too great an inference to draw from the facts that there was an agreement between Oliver Wethered and the bankrupt that, in consideration of the deposit of the promissory notes, Oliver Wethered would accept repayment of his advance of 500*l.* by instalments, and would not enforce the payment of his advance, so long as Saunders paid the amount

(1) (1844) 3 M. D. & D. 586.

of the notes as they became due, yet it is quite clear that Oliver Wethered, on the strength of the deposit of the promissory notes, did in fact forbear to sue the bankrupt and did in fact give him time and did in fact accept payment by instalments of the amounts of the promissory notes as and when they were paid. Adapting the language of Parker J. in *Wigan* v. *English and Scottish Law Life Assurance Association* (1) those facts appear to constitute a sufficient consideration, though in a sense they are an ex post facto consideration for the deposit of the notes. I am, therefore, on the whole of opinion that the defence of the respondent ought to prevail and that the trustee is not entitled to succeed on this part of his motion.

There is one further point which I ought to mention as to the 90*l.* paid to Oliver Wethered before the receiving order. Whatever may be said as to the payments made by Saunders after the receiving order, it seems to me clear that the payment of the 90*l.* was a payment protected by s. 45, sub-s. (*b*), and that, even if I am wrong as to the rest of the debt of 316*l.* 10*s.* 2*d.*, the trustee cannot succeed as to the 90*l.*

In the result I hold that the trustee is entitled to a declaration that the judgment debt of 903*l.* 1*s.* formed part of the property of the bankrupt divisible amongst his creditors and to the appropriate consequential relief. The trustee's claim in respect of the debt of 316*l.* 10*s.* 2*d.* will be dismissed. As the trustee has succeeded in part and failed in part, I think that the proper order to make is that the trustee should have his costs out of the estate, and that the respondent should bear his own costs.

Solicitors: *Isadore Goldman & Son; Hays, Roughton & Dunn.*

(1) [1909] 1 Ch. 291, 297, 298.

H. C. H.

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1925
Oct. 14, 15.

Vendor and Purchaser—Sale of Land—Refusal by Vendor on Ground of Expense to apply to Court for Order enabling him to make good Title—"Unwillingness"—Notice by Vendor to rescind—Notice Void—Vendor bound to make Application to Court.

The respondent contracted to sell a house to the applicant. The contract incorporated the public sale conditions of the Somerset Law Society, cl. 5 of which provided that: ". . . . If the purchaser shall insist on any objection or requisition which the vendor shall be unable, or on the ground of expense, unwilling to remove or comply with, the vendor may by notice in writing to be given to the purchaser, and notwithstanding any intermediate negotiation or litigation, rescind the contract for sale. . . . ." The abstract of title disclosed the fact that the legal estate was not vested in the respondent. The respondent was aware of that fact at the time he entered into the contract, but he hoped to make good the title with the concurrence of the trustee. After much negotiation, the applicant submitted a requisition containing a demand that the respondent should make certain applications to the Court with a view to perfecting the title. This the respondent refused to do on the ground of expense, and on the applicant persisting in his demand, the respondent's solicitors, by a notice in writing, purported, on his behalf, to rescind the contract:—

Held, that the respondent had acted recklessly and unreasonably; that he was not entitled to rescind the contract under cl. 5; that the notice to rescind was void and of no effect, and that he was bound to make the necessary application to the Court.

On December 2, 1924, the applicant contracted to purchase from the respondent a house at Weston-super-Mare. The written contract incorporated the public sale conditions of the Somerset Law Society. Clause 5 of such conditions provided that: ". . . . If the purchaser shall insist on any objection or requisition which the vendor shall be unable, or on the ground of expense, unwilling to remove or comply with, the vendor may by notice in writing to be given to the purchaser, and notwithstanding any intermediate negotiation or litigation, rescind the contract for sale unless within ten days after the delivery of such notice the purchaser shall, by notice in writing to be given to the vendor, withdraw such objection or requisition, and upon such rescission the deposit and fees (if any) paid by the purchaser shall be returned to him and accepted by him in full satisfaction of all claims

on any account whatever, and the purchaser shall thereupon return all abstracts and other papers in his possession belonging to the vendor." In due course the respondent delivered an abstract of his alleged title. This abstract showed that the premises had been the property of his late wife, who by a will, after appointing an executor and trustee, had devised the premises in trust for sale. It further appeared that she had made a second will, by which she had appointed a different executor and trustee. It also appeared that under the provisions of a marriage contract, and in the events which had happened, the respondent had a usufruct in the property. The applicant submitted several requisitions, and finally he submitted a requisition containing a demand that the respondent should make certain applications to the Court with a view to perfecting the title. This the respondent refused to do on the ground of expense, and on the applicant persisting in his demand, the respondent's solicitors, by a notice in writing dated March 19, 1925, purported on his behalf to rescind the contract. The applicant then took out this summons, asking (1.) for a declaration that the respondent was not entitled to rescind the contract under the conditions of sale included therein, and that the notice to rescind was void and of no effect; (2.) that it might be declared that the respondent was bound, in order to make a good title to the property, to make the necessary applications to the Court under the Settled Land Acts, 1882 to 1890, for an order appointing trustees of the settlement under which he was tenant for life for the purposes of the Acts, and giving him liberty to exercise his power of sale, and to use his best endeavours to obtain such an order, and to register the same as a lis pendens. The further facts appear in the judgment.

Farwell K.C. and *Wilfrid Hunt* for the applicant. It is necessary to consider how far the vendor has acted reasonably and without any sort of disregard of the rights of other people from the beginning: *Greaves* v. *Wilson* (1) and *Quinion* v. *Horne.* (2) In this case the difficulty would not

(1) (1858) 25 Beav. 290, 294. (2) [1906] 1 Ch. 596.

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have arisen if the vendor had an absolute title. If the vendor sells in a particular capacity (here as beneficial owner) any difficulty which arises out of his title is one to which the condition applies. He cannot rely on a condition of this kind if a difficulty arises out of another title which he has to make out in order to satisfy his contract. If he allows himself to be taken as absolute owner when he is nothing of the kind, he has acted so recklessly that he cannot rely on the condition. If a vendor cannot give a title without making an application to the Court, his first duty is to make that application. Here the vendor has no title to sell except as tenant for life, and in order to sell as tenant for life he is obliged to apply to the Court. The applicant is not obliged to take a title from some one else. The contract was with the respondent. It is all a question of reasonableness, and it is wholly unreasonable for the respondent to say he will not take a step which he is bound to take in order to give a title. The Court has to look at all the circumstances of the case.

The respondent has refused to do what is necessary to complete the contract. Therefore he has broken his contract, and must pay damages. He cannot get rid of his obligation by rescinding: *In re Jackson and Haden's Contract.* (1)

McMullan for the respondent. It is really a question of reasonableness. There is no suggestion here that the respondent was acting for any ulterior purpose. He knew that he was not the party to sell, but he also knew that he could get the concurrence of the necessary parties. They were always willing to concur. The applicant accepted this state of affairs at first, and waived his extreme rights under the contract. Under those circumstances there was no real difficulty in the will of the respondent's wife. It was clear on the authorities that the trustee had whatever estate was necessary, and no Court would hold that the will did not give the property to the trustee: *Davies to Jones and Evans.* (2) It was only after a considerable time had passed that the applicant raised the question of the Settled Land Act. It was, therefore, not necessary for the respondent to make the

(1) [1906] 1 Ch. 412. (2) (1883) 24 Ch. D. 190.

application to the Court demanded by the applicant, and a vendor is not obliged to undergo expenses that are not necessary. Under these circumstances, when the applicant insisted on the respondent making this application to the Court, the respondent was entitled to rescind the contract: *In re Deighton and Harris's Contract.* (1) In the more recent case of *Procter* v. *Pugh* (2), under circumstances which were somewhat different to those in the present case, it was held that the vendor was entitled to rescind.

Farwell K.C. in reply.

ROMER J. This summons under the Vendor and Purchasers Act raises a difficult question as to whether, in the circumstances of the case, the respondent was justified in rescinding the contract under a condition of rescission which is more or less in the common form.

The contract, the subject matter of which was a house at Weston-super-Mare, is dated December 2, 1924. It consists of a written document, which is headed "Conditions of Sale," and which embodies by reference certain general conditions of sale of the Somerset Law Society. The document, after describing the vendor and the purchaser, states that the tenure of the property is freehold. It then mentions the price and what is said to be a ground rent, but which I understand is in fact a rentcharge, and then it states that the date for settlement—that is to say the date for completion—is January 1, 1925. It then proceeds: "The property is sold subject to the covenants and conditions under which the same is now held by the vendor," and it goes on to say, "and the title shall commence (*a*) With the grant creating above mentioned ground rent," and it provides: "The public sale conditions of the Somerset Law Society (so far as they are applicable to a sale by private treaty) are incorporated herewith."

So that on the face of that contract Mr. Des Reaux is purporting to sell the freehold of a property which he says is then held by him under certain covenants and conditions.

(1) [1898] 1 Ch. 458. (2) [1921] 2 Ch. 256.

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The incorporated conditions of sale include one numbered 5, which is the material one in this case. [His Lordship read cl. 5 and continued:] In due course the vendor delivered what purported to be an abstract of his title. The abstract disclosed the fact that the property had been conveyed to the vendor's wife in the month of October, 1921; that she had died, having by her will appointed one Herbert Harger Scott executor and trustee thereof, and had devised the house, the subject matter of the contract, upon trust for sale at any time on the written consent of the vendor during his life, and after his death at the discretion and direction of the trustee. Then the abstract stated that the wife had died in 1924, and that the will had been proved by Scott.

So far as the abstract went it seemed obvious that the vendor had no title whatsoever to the property. It merely showed that the property was vested in Scott as the personal representative of the vendor's wife. The purchaser, who was under no obligation to take a title from Scott, might thereupon have declined to proceed further with the matter. But instead of taking up that attitude the purchaser made a requisition, which in effect pointed out that though the vendor had no title the purchaser was willing to accept one from Mr. Scott. There were, however, other requisitions, and amongst them requisition No. 3, which was in these terms: "As neither the original will nor the probate thereof of the late Clara Eva Des Reaux was produced for examination, a copy of the will should be supplied. The probate of the will must be produced on completion, and a certificate produced of the payment of the estate duty which became payable on the death of the testatrix." Requisition 4 was in these terms: "It is presumed that the conveyance to the purchaser will be executed by Herbert Harger Scott. Will he convey as personal representative or as trustee? If he sells in the latter capacity the concurrence of John Eugene Des Reaux will be required to evidence the consent necessary under the will of the late Clara Eva Des Reaux. The contract has been signed by John Eugene Des Reaux, which is not at all understood, and an explanation thereof should be given."

The answer to requisition 3 was: "Copy of the will is sent herewith. This will has been before the Court and a copy of the order of the Probate Division accompanies. Probate has not yet been received but will be produced on completion." The answer to requisition 4 was: "Mr. H. H. Scott will convey as trustee. Mr. John Eugene Des Reaux will concur in the conveyance. The contract was carried through by the estate agents. Mr. Scott confirms the sale."

Now, when the order referred to there of the Probate Division was produced, it appeared that so far from there only having been this one will there had been two wills executed by the lady. By the first will it is true that, as stated in the abstract, she had appointed Mr. Scott the executor and trustee; but she had made a later will, which was dated May 3, 1924, only seven days after the first, and by that second will she had revoked the first will, except in so far as it dealt with her real estate. She disposed of the rest of her estate by this second will, and appointed a Mr. Pelley to be executor of it. Proceedings took place in the Probate Division, and it was then that the order to which I have referred was made.

It further appeared that under the first will the vendor was entitled to a life interest in the proceeds of sale of the house. On these documents a question at once arises as to who was the personal representative of the wife for the purposes of the Land Transfer Act. Could Scott be so described? If not, could Pelley be so described? Could both of them together be so described? That is a question of some difficulty, which I am thankful I am not called upon to answer. But at any rate I can say that in my opinion there is the very gravest doubt whether Mr. Scott was the personal representative. That would not affect any title he might have under the will as trustee for sale; but before he could exercise the trust for sale there would have to be an assent by the personal representative to the devise, and the question would arise as to whom the property had been devised in fact. No devisee is expressly mentioned in the will. Mr. Scott is no doubt appointed as trustee, and there is a trust for sale, but there is no express devise. But the difficulties

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did not stop there, for the vendor's solicitors proceeded to disclose yet another document. That turned out to be a marriage contract made, I think, according to the law of Jersey, and entered into on the occasion of the marriage of the vendor to his late wife. Under that contract it was provided that after the death of the wife the husband should have a life estate in her immovable estate, including this house at Weston-super-Mare. That being so, it would seem as though the vendor might make a title as tenant for life of the property, if he obtained the appointment of trustees for the purposes of the Settled Land Act of the settlement, consisting of the marriage contract and the will of the testatrix. Or he might surrender his equitable life interest under the marriage contract and sell as tenant for life under the first will by virtue of s. 63 of the Settled Land Act, 1882. But, having regard to s. 7 of the Settled Land Act, 1884, he could only make a title in that way by the leave of the Court. Although, therefore, the abstract, as originally delivered, showed that the vendor had no title at all, it appeared from the further documents disclosed that a title might be made by him in either of the two ways I have mentioned.

Now, the purchaser still continued to adopt a reasonable attitude. He did not throw up the contract altogether, but proceeded to point out as best he could how he thought the difficulties in the vendor's way might be got rid of; and eventually by a letter dated March 5, 1925, his solicitors, after stating that they had taken counsel's opinion on the matter, made the following further requisition, amongst others: "An order should be obtained by the vendor on originating summons, construing the will of Mrs. Des Reaux and declaring in whom the trust for sale is vested and in which of the executors the property is vested under the Land Transfer Act, 1897"—that is one way of getting over the difficulty—"unless Mr. Des Reaux merges his usufruct" (that was his life interest under the marriage contract) "and sells under the powers of the Settled Land Acts—in which case he would only have to obtain an order at Chambers appointing trustees for the purposes of the Acts (under

section 38 of the Act of 1882) and giving him liberty to exercise the powers of a life tenant."

I think, perhaps, it was not necessary to obtain the appointment of trustees for the purpose of the Settled Land Acts, for I think that it is really reasonably clear that the trustee for the purpose of the Settled Land Acts was Mr. Scott, and if he was it was not necessary that another trustee should be appointed. But however that may be the answer was this: "We cannot agree that either of the courses suggested is necessary. The grant of probate was made to Mr. Scott in respect of this particular real estate, and he is therefore entitled to sell and convey as legal personal representative. If desired, however, Mr. H. Pelley, the other executor, will also convey as legal personal representative." That is an assertion by the vendor that he does not propose to make the title through Mr. Scott as trustee for sale or by himself as tenant for life, but that he is asking the purchaser to accept a conveyance by Mr. Scott as the legal personal representative of the testatrix for the purposes of the Land Transfer Act—which in my opinion he probably was not—and that if desired Mr. Pelley the other executor would also convey as legal personal representative.

Now, a title through Mr. Pelley would be a very doubtful title indeed coming in at this stage, because, supposing he were legal personal representative for the purposes of the Land Transfer Act, he had been directed to pay all the debts out of the personal estate; and if he suddenly conveyed this real estate merely because the person who had entered into a contract to sell it could not make a title without Mr. Pelley's concurrence, a doubt would at once have arisen as to whether Mr. Pelley could possibly be selling the property for the purposes of paying debts. The letter goes on to say: "We shall be glad to know at your earliest convenience whether you propose to insist upon this requisition so that we may take instructions whether to give notice to rescind the contract under No. 5 of the Public Sale Conditions of the Somerset Law Society."

In the end the purchaser did insist on the requisition, and

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the vendor purported to rescind the contract. The question I have to determine is whether in the circumstances the vendor was justified in rescinding. He certainly was unwilling to comply with the requisition, but, as has frequently been pointed out, the word "unwilling" in such a connection as this has to be qualified. The unwillingness must neither be arbitrary nor unreasonable.

I think there is only one case I need refer to, because in the course of the judgment in that case several of the other cases are dealt with. It is the case of *In re Jackson and Haden's Contract.* (1) Collins M.R. in his judgment says this: "Now, it is to be noted that, in dealing with this right to rescind, the learned judges have always criticized most carefully the conduct of the parties to the contract, and the purpose for which the particular condition must be supposed to have been introduced, with a view to seeing whether or not it is, in the circumstances of the particular case, a condition that ought to be applied for the benefit of the person who has introduced it. In this particular case, there is no doubt that this clause was introduced for the benefit of the vendors. The Court considers whether or not the vendor has so acted in the matter as to be entitled to avail himself of that condition; or it may be put in other words. Can we construe this condition, in the circumstances, as applying to the particular state of facts which has caused the difficulty?" Then he refers to the observations of Turner L.J. in *Duddell* v. *Simpson* (2), in which the Lord Justice has said: "I only refer, therefore, to the question of unwillingness because several cases bearing upon it have been cited before us. Those cases have settled, and, I think, very wisely settled, that the word 'unwilling,' in a condition of sale of this description, is not to be considered as giving an arbitrary power to the vendor to annul the contract. I think that in a case where the vendor annuls the contract on the ground of unwillingness, he must show some reasonable ground for unwillingness; thus, for instance, he may show that if he proceeds to comply with a requisition, he will be involved

(1) [1906] 1 Ch. 412, 419, 420, 421, 422.

in expenses far beyond what he ever contemplated, or be involved in litigation and expenses which he never contemplated, and for avoiding which he reserved to himself the power of annulling the contract. But to say that a vendor, upon a condition of that description, could annul a contract brevi manu, without attempting to answer any of the requisitions that are made on the part of the purchaser, would be opposed both to principle and authority; for that would, in truth, be giving to the vendor the power of saying that that which was intended as a sale, and was a sale, shall, in truth, be no sale at all." Then Collins M.R. goes on as follows: "That case, and another one that has been cited, very clearly bring out the exact line of difference between the cases in which the Court will allow the vendor to avail himself of such a condition and those where it will not." In *Duddell* v. *Simpson* (1) the vendor was held entitled to rely upon the condition for rescission. He had put up for sale certain property as held under a lease for twenty-four years, when in fact he himself was only entitled to an underlease of the property for the term of twenty-four years less three days. The vendor in doing so was relying on the promise of the persons entitled to the three days to concur. They subsequently refused to concur, and the Court of Appeal held that the vendor could not be considered to have made a misrepresentation so as to disentitle him to the benefit of the rescission clause. Collins M.R. says: "The vendor in that case, therefore, had taken steps to assure himself, and was thoroughly satisfied that he should be in a position to make a complete title to that which he purported to sell." In other words he behaved reasonably towards his purchaser. In all these cases a purchaser is entitled to assume that the vendor has done everything that is reasonable to assure himself that he is in a position to carry out the contract which he has entered into. Then Collins M.R. goes on: "The other case which, I think, contrasts with that, and brings out the distinction I have in my mind, is *Nelthorpe* v. *Holgate*. (2) In that case a vendor contracted to sell an estate in fee, with a

(1) (1866) L. R. 2 Ch. 102, 107. (2) (1844) 1 Coll. 203.

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stipulation that if any dispute should arise as to the title the same should be submitted to some eminent conveyancer, and if he should be of opinion that a good title could not be made, the contract should be rescinded. Upon the delivery of the abstract it appeared that the vendor's mother had a life interest in the premises, and that her interest was known to the vendor at the time of the contract. Upon her refusing to join in the conveyance to the purchaser, Knight Bruce V.-C. held that the vendor was not entitled to rely on the before mentioned stipulation as a ground for rescinding the contract, but that the contract must be specifically performed with compensation. The Vice-Chancellor says this (1) : ' If, indeed, Mr. Holgate had satisfied the Court, that he entered into the contract of March in ignorance of his mother's life estate, or under a mistaken notion, that he was entitled to sell and could make a title to the fee simple in possession without her concurrence, or in consequence of any promise or representation on her part, that she would concur in the sale ; or, if he had shown, that, when the agreement was made, either Mr. Holmes, Mr. Grantham, or Sir John Nelthorpe knew, or had, as between them and Mr. Holgate, notice, of Mrs. Holgate's interest or her son's inability to make a title without her consent, the case would have been different, and might, possibly, have been materially different from its present position.'

" Now, what is the element that the Vice-Chancellor is seeking for there which determines the case ? It seems to me to be an element of something on the part of the vendor less than the law requires of him in such cases. It may stop short of fraud, it may be consistent with honesty; but, at the same time, there must be a falling short on his part—he must have done less than an ordinary prudent man, having regard to his relations to another person, when dealing with him, is bound to do ; and therefore where, knowing the exact facts, he has recklessly made a description of them which would mislead another person who did not know as much as himself (even though he thought that

(1) 1 Coll. 222.

person might know as much as himself), there is a clear failure of duty on the part of the vendor which fairly disentitles him to say that a clause introduced into the contract for his benefit is introduced to meet such a case as that which has arisen here, namely, a reckless disregard by the vendor of his duty as to accuracy of statement when he is making a statement with a view to other people acting on it as correct."

As I have pointed out, the vendor here has contracted on terms which seem to suggest that he himself is the owner of the property, and that he can, so far as he knows, make a good title and sell the fee simple. In point of fact at the time he entered into this contract, the vendor, so far as his knowledge went, knew that he could not make a title. He thought he could not make a title because, although he knew that he had a life interest in the proceeds of the property under his wife's will, he did not know that he could for that reason sell the property, and he did not know that he had a life interest in the property under the marriage settlement. The position the vendor takes up is: "I had no intention of selling by virtue of my life interest in the property; I was unaware that I had any and that I could do so, but I knew Mr. Scott would do all that was necessary in carrying out the contract, and I thought I was justified in entering into the contract myself."

As far as I can gather at the time the contract was entered into he had not consulted Mr. Scott about it. He does not appear to have taken any advice from any competent legal adviser as to the title to the property, and, in my opinion, he acted recklessly in entering into the contract with the purchaser to sell the fee simple in this house, seeing that when he entered into it he entered into it in the belief that he himself had no title. In these circumstances when attention is called to the fact that he has not got a title, but it is shown that by making certain applications he can make a title to the property, I am of opinion that to rescind the contract on the ground that to take the steps pointed out to him by the purchaser would involve him in expense is

ROMER J. not a reasonable thing for the vendor to do in reference to the purchaser.

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I may even go further than that. Supposing that he had contracted to sell as tenant for life, and that on delivery of the abstract it appeared that although he had the powers of a tenant for life under s. 63 of the Settled Land Act, 1882, he had not got an order of the Court under the Settled Land Act, 1884; or supposing it turned out that there were no trustees for this purpose of the Settled Land Acts, and he was asked by the purchaser to make the necessary application to the Court, it would not in my opinion be a reasonable exercise by the vendor of this condition to rescind the contract. I do not think that would be reasonable because, as was pointed out in *Greaves* v. *Wilson* (1), in all cases the vendor must do his best to comply with the obligations which by contract he has undertaken towards the purchaser. I can well understand that where, on a closer examination of the title it appears that there is some blot on it which was unknown and unsuspected by the vendor, even although that blot can be removed by the expenditure of a comparatively small sum of money, it may be quite reasonable for him to rescind the contract if the purchaser insists upon that expenditure being incurred. It is to meet such cases as that that conditions of this description are inserted. But it is not, I think, reasonable for a man who contracts to sell as tenant for life to refuse to take those steps which it ought to be known to him are required by law to put him in a position to exercise his powers as tenant for life in favour of the purchaser. Whether, therefore, I regard this as a contract entered into by a man who had no title whatsoever, but hoped that he might get somebody else to make a title to it, or whether I regard it—as the vendor himself did not regard it—as a contract by a tenant for life, in either case it appears to me unreasonable in the circumstances for the vendor to exercise the power reserved to him by condition 5.

For these reasons, although I agree the case is one of considerable difficulty, I have come to the conclusion that,

(1) 25 Beav. 290.

in answer to the summons I must declare that the respondent is not entitled to rescind the contract under the conditions of sale, and that the notice sent on March 19 to the purchaser's solicitors by Messrs. Scott & Fowler, on behalf of the respondent, was and is void and of no effect, and that he is bound to make the necessary application to the Court.

Solicitors for applicant: *Bell, Brodrick & Gray, for Cousins, Botsford & Co., Cardiff.*

Solicitors for respondent: *Gustavus Thompson & Sons, for Scott & Fowler, Gloucester.*

P. J. B.

In re CITY LIFE ASSURANCE COMPANY, LIMITED.

GRANDFIELD'S CASE.

STEPHENSON'S CASE.

[No. 00463 of 1923.]

Company—Life Assurance Policies—Mortgages by Policy-holders to Company —Equitable Assignment of some Mortgages to Trustees —No Notice to Mortgagor—Winding Up—Mutual Credits—Set-off—Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 31.

The holder of an endowment policy mortgaged it to the issuing company, which went into compulsory liquidation when only one premium remained to be paid. The last premium was duly paid, the policy matured and was valued in the winding up under s. 17 of the Assurance Companies Act, 1909. The policy holder claimed to set-off the value of the policy against his mortgage debt:—

Held (affirming Eve J.), that s. 31 of the Bankruptcy Act, 1914, applied, and that the policy holder was entitled to the set-off which he claimed.

In re National Benefit Assurance Co. [1924] 2 Ch. 339 approved.

The decision in *Ex parte Price* (1875) L. R. 10 Ch. 648 not followed, being in the opinion of the Court inconsistent with the later decisions of the same Court in *Lee & Chapman's Case* (1885) 30 Ch. D. 216; *In re Daintrey* [1900] 1 Q. B. 546; and *In re Taylor* [1910] 1 K. B. 562. *Paddy* v. *Clutton* [1920] 2 Ch. 554 not adopted.

Another policy holder in the same company mortgaged his policy to the company, and the mortgage deed contained an absolute covenant by the mortgagor for payment of principal and interest, but provided that so long as the mortgagor paid the premiums and interest and

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performed his other obligations under the deed, the debt would not be called in. The company equitably assigned the mortgage to certain trustees for another class of policy holders, and no notice of this assignment was given to the mortgagor. The whole mortgage debt was outstanding at the commencement of the winding up. The policy holder claimed to set off the amount due to him on his policy against his mortgage debt:—

Held (affirming the decision of Eve J.), that inasmuch as the equitable assignment was complete, as between the company and their assignees, without notice to the mortgagor, there was no mutual credit or mutual debt between the company and the policy holder which could come within s. 31 of the Bankruptcy Act, 1914, and that the latter had no right of set-off, notwithstanding the provisions of the mortgage deed.

GRANDFIELD'S CASE.

THIS was an appeal from a decision of Eve J. upon a summons taken out in the winding up of the above-named company to determine (inter alia) whether or not, as between the respondent Pitts, a policy holder, who had mortgaged his policy to the company, on the one hand, and the company on the other, there was a right of set-off as between the amount due on his policy and the amount of his mortgage debt.

The material facts were as follows:—

On March 6, 1905, Pitts took out an endowment policy in the company for 232*l.*, payable on his attaining the age of sixty years, or on his previous death, at an annual premium of 10*l.* 8*s.* 6*d.* On November 29, 1918, Pitts mortgaged the policy to the company to secure an advance of 114*l.*

On July 19, 1923, an order for the compulsory winding up of the company was made upon a petition dated June 30, 1923, which latter date was, by s. 139 of the Companies (Consolidation) Act, 1908, to be deemed the commencement of the winding up.

On the due date in December, 1923, Pitts paid the last annual premium, and on December 28, 1923, his policy matured for payment.

The liquidator sought to recover payment from Pitts of the mortgage debt and interest, and Pitts claimed a right of set-off against the liquidator pro tanto for the amount due to him under his matured policy.

Eve J., following his own decision in *In re National Benefit Assurance Co.* (1), held that Pitts had a right of set-off.

Grandfield, who had not mortgaged his policy to the company and had been appointed to represent all holders of policies who had not borrowed money from the company, appealed.

Pitts had been appointed to represent all policy holders who had borrowed money from the company on their policies.

The appeal was heard on October 23, 26 and 27, 1925.

Preston K.C. and *R. F. Roxburgh* for the appellant. The question on this appeal turns upon s. 31 of the Bankruptcy Act, 1914. (2) There was a debt due from Pitts to the company under his mortgage, and the question is whether the surrender value of the policy is a debt due from the company to Pitts which he is entitled to set-off. There was no mutual debt or dealing between him and the company to create any right to set-off. Nothing was due on the policy at the date of the winding up, and therefore no account could be taken between him and the company. The value of the policy has, in the circumstances, to be ascertained under s. 17 of the Assurance Companies Act, 1909, so that upon the winding up the policy holder is deprived of his right to prove for damages for breach of contract and he can only prove for the value of the policy so ascertained. The effect of the decision of Eve J. is that policy holders who have mortgaged their policies to the company are in a better position than those who have not done so.

(1) [1924] 2 Ch. 339.

(2) Sect. 31 provides:—"Where there have been mutual credits, mutual debts or other mutual dealings, between a debtor against whom a receiving order shall be made under this Act and any other person proving or claiming to prove a debt under the receiving order, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set-off against any sum due from the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively; but a person shall not be entitled under this section to claim the benefit of any set-off against the property of a debtor in any case where he had, at the time of giving credit to the debtor, notice of an act of bankruptcy committed by the debtor and available against him."

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In *Ex parte Price* (1), a decision of this Court, it was held that the trustee in liquidation of a policy holder who had mortgaged his policy to the company could not set-off the estimated value of the policy against the liquidators of the company suing to recover the mortgage debt. That was decided upon s. 39 of the Bankruptcy Act, 1869, which for all practical purposes was in terms similar to those of s. 31 of the Bankruptcy Act, 1914, and the decision governs the present case. In *Sovereign Life Assurance Co.* v. *Dodd* (2) this Court distinguished *Ex parte Price* (1), and Kay L.J. said that he did not desire in any way to dissent from the decision in *Ex parte Price.* (1) In *Paddy* v. *Clutton* (3) Russell J. felt himself bound by *Ex parte Price* (1), and held that in an action to redeem the mortgaged policy, the mortgagor could not set-off the value of the policy ascertained under the Assurance Companies Act, 1909.

The facts in *In re National Benefit Assurance Co.* (4) were similar to those in *Ex parte Price* (1), and Eve J. decided that there was a right of set-off, and followed that decision in the present case. The policy holder is seeking, not to prove for damages for breach of contract, but for the statutory value of his policy under the Assurance Companies Act, 1909, and the question which has to be considered under s. 31 of the Bankruptcy Act is what is due from the one party on the one side, and from the other party on the other. The policy holder is claiming, not a debt due from the company at the date of the winding up, but a notional sum ascertained for the purposes of proof, and as to which, we submit, there is no right of set-off.

In re Daintrey (5) is distinguishable on the ground that in that case there was an existing liability at the date of the receiving order. There was no suggestion in that case that *Ex parte Price* (1) had been wrongly decided. *In re Asphaltic Wood Pavement Co.* (*Lee & Chapman's Case*) (6) goes no further than *In re Daintrey* (5), and neither case is inconsistent with *Ex parte Price.* (1)

(1) L. R. 10 Ch. 648.
(2) [1892] 2 Q. B. 573.
(3) [1920] 2 Ch. 554, 559.
(4) [1924] 2 Ch. 339.
(5) [1900] 1 Q. B. 546.
(6) 30 Ch. D. 216.

In order that this cross-claim may be a mutual dealing within s. 31 it must be possible for an account to be taken: *Mersey Steel & Iron Co.* v. *Naylor, Benzon & Co.* (1) Unliquidated damages may be set-off under the mutual credit section: *Booth* v. *Hutchinson.* (2) The sum ascertained under s. 17 of the Assurance Companies Act, 1909, is not a sum due from the company, but a sum ascertained for the purposes of proof under rules different from those used for assessing damages for breach of contract. The effect of s. 17 of the Act is dealt with in *In re Law Car & General Insurance Corporation.* (3)

Clayton K.C. and *C. W. Turner* for the respondent Pitts.

There were mutual credit and mutual dealing between the company and the respondent. The words of s. 30 of the Bankruptcy Act, 1914, clearly contemplate a liability such as this by the company to the policy holders. The date of the presentation of the petition is the material date: *Sovereign Life Assurance Co.* v. *Dodd* (4), and at that date only one premium remained to be paid. It was duly paid, and the liability of the company under the policy became a debt provable in the bankruptcy. The Assurance Companies Act, 1909, merely created a mode of estimating the amount for which the policy holder should be entitled to prove, it did not render the liability less capable of proof. The policy holder's claim was a debt payable on a contingency within s. 206 of the Companies (Consolidation) Act, 1908, which section incorporates the bankruptcy provisions as to proof of debts, including the provisions of s. 30, sub-s. 8, of the Bankruptcy Act, 1914. The company by going into liquidation committed a breach of contract with the policy holders for which they are entitled to prove for damages in the winding up.

The mutual credit rule in bankruptcy at first applied only to a person who became a bankrupt in his lifetime; then s. 25 of the Judicature Act, 1873, made it applicable to the estate of a deceased person but not to a company; and in

(1) (1884) 9 App. Cas. 434.
(2) (1872) L. R. 15 Eq. 30.
(3) [1913] 2 Ch. 103.
(4) [1892] 2 Q. B. 573.

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August, 1875, after the decision in *Ex parte Price* (1), s. 10 of the Judicature Act, 1875, made the rule applicable to a company as well, but that section does not say anything about mutual credit, and the Acts referred to contain no express words dealing with set-off. The right of set-off was brought in under the words " debts provable or deemed to be provable," and *Mersey Steel & Iron Co.* v. *Naylor, Benzon & Co.* (2) shows how the rule as to set-off came to be applied to a company if the debt is provable. As soon as there is a debt provable, then set-off follows as an inevitable result: *Lee & Chapman's Case* (3); *In re Daintrey* (4); *In re Taylor.* (5) *Ex parte Price* (1) is inconsistent with the ratio decidendi of the later cases, and the basis of the decision in that case was the absence of any rule of set-off in the winding up of a company.

We submit that the decision of Eve J. in *In re National Benefit Assurance Co.* (6), followed by him in the present case, was correct.

Preston K.C. in reply.

Gavin Simonds K.C. and *Heckscher* for the liquidator.

STEPHENSON'S CASE.

This was an appeal from a decision of Eve J. upon another question arising in the same summons to determine whether or not, as between the class of policy holders and mortgagors on the one hand and the company on the other, there was a right of set-off as between the amount due on their policies and the amount of their mortgage debts, the mortgages in question having been equitably assigned by the company to certain trustees for another class of policy holders.

The material facts were as follows :—

On April 1, 1915, the appellant Stephenson had taken out a policy in the company assuring the payment of 1000*l.* on April 1, 1940, or on his previous death, at an annual premium

(1) L. R. 10 Ch. 648.
(2) 9 Q. B. D. 648; 9 App. Cas. 434.
(3) 30 Ch. D. 216.
(4) [1900] 1 Q. B. 546.
(5) [1910] 1 K. B. 562.
(6) [1924] 2 Ch. 339.

of 36*l.* 15*s.* payable on April 1 in every year. On December 16, 1921, Stephenson mortgaged the policy and a house which belonged to him to the company to secure an advance by them of 1000*l.*, the whole of which was outstanding and unpaid at the commencement of the winding up of the company. The mortgage deed contained an absolute covenant by the mortgagor to pay the principal money advanced and interest, and a proviso that so long as the mortgagor paid the premiums and interest and performed his other obligations under the deed the debt should not be called in.

Previous to the commencement of the winding up, Stephenson's mortgage had, without notice to him, been equitably assigned by the company to the trustees for another class of policy-holders under a trust scheme the details and objects of which are fully mentioned in the following judgment of the Master of the Rolls.

It was stated at the hearing of the appeal that some 900 mortgages, securing about 375,000*l.*, had been so assigned to or deposited with the trustees.

In the circumstances above set out, the question arose whether the decision of Eve J. in *Grandfield's* case (ante) could be extended so as to include the case of policy holders and mortgagors whose policies had been so assigned, but Eve J. held that in their case there was no right of set-off, inasmuch as owing to the assignment there was no mutual credit or mutual debt within s. 31 of the Bankruptcy Act, 1914.

Stephenson, who had been appointed to represent all policy holders and mortgagors whose mortgages had been assigned to the trustees, appealed.

The appeal was heard on October 26 and 27, 1925.

Manning K.C. and *Bischoff* for the appellant Stephenson. We contend that there is a right of set-off in this case similar to that which has been given in the earlier case, and that the principle of that decision extends to cases where the mortgagee has equitably assigned the mortgage debt. The transferees or sub-mortgagees of the mortgages on the policies never gave

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notice of their charge to the mortgagors, and so never completed their security. Eve J. thought he was bound by *Lee & Chapman's Case* (1), but in that case Bacon V.-C. relied upon the notice as the basis of his decision, and Brett M.R. also deals with the point; and we submit that the judgment of this Court in that case proceeds upon the basis of completion of the charge by notice. At the time of the winding up there arose a statutory right of set-off, and there is no reason why that should be affected by the fact that the mortgages had been deposited with or equitably assigned to the trustees, who had not completed the assignment by the necessary notice. The importance of notice is illustrated by *Norrish* v. *Marshall* (2); *In re Lord Southampton's Estate* (3); *Turner* v. *Smith.* (4)

There was mutuality between the company and the mortgagors in the first instance under the terms of the mortgage deed by which the mortgage debt was payable only out of the policy moneys. The rights of the mortgagor in this respect could not be destroyed behind his back. The mutuality could not be severed without notice to the mortgagors. In *Lee & Chapman's Case* (1) there was no mutuality to start with. In that case notice of the charge was given before the winding up. Here, no nctice was given at all.

[*Ex parte Cleland* (5) and *Forster* v. *Wilson* (6) were also referred to.]

Grant K.C. and *Dighton Pollock* for the respondent trustees. Notice is immaterial, for as between assignor and assignee an equitable assignment is complete without notice: *Gorringe* v. *Irwell India Rubber and Gutta Percha Works.* (7) These mortgages were not assets of the company at all. If a third party intervenes then s. 31 of the Bankruptcy Act, 1914, cannot apply, because there is no longer any mutuality. Mutuality is destroyed, and the account under s. 31 cannot be taken.

Manning K.C. in reply.

Gavin Simonds K.C. and *Heckscher* for the liquidator.

(1) 26 Ch. D. 624; 30 Ch. D. 216.
(2) (1821) 5 Madd. 475.
(3) (1880) 16 Ch. D. 178.
(4) [1901] 1 Ch. 213.
(5) (1867) L. R. 2 Ch. 808.
(6) (1843) 12 M. & W. 191.
(7) (1886) 34 Ch. D. 128.

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GRANDFIELD'S CASE.

POLLOCK M.R. This is an appeal from a judgment of Eve J. given in November, 1924, upon a summons taken out in the winding up of the City Life Assurance Company, Ld., to determine whether or not the respondent, Mr. Pitts, has a right of set-off against the liquidator, who seeks to recover payment from him of the mortgage debt and interest. Mr. Pitts claims that he has a right of set-off against the liquidator pro tanto for the amount due to him under his matured policy.

Conflicting decisions have been given on this point by Russell J. and Eve J. In 1920 Russell J. in a case of *Paddy* v. *Clutton* (1) felt compelled to follow a decision of this Court in *Ex parte Price* (2), and to decide with reluctance, in circumstances not dissimilar from this case, that there was no right of set-off. Eve J. in *In re National Benefit Assurance Co.* (3) found himself able to distinguish the case before him from *Ex parte Price* (2), and decided that there was a right of set-off, and he has followed that decision in his judgment on the present summons. The question therefore is clearly raised whether *Ex parte Price* (2) governs the present case.

By s. 206 of the Companies (Consolidation) Act, 1908: "In every winding up (subject in the case of insolvent companies to the application in accordance with the provisions of this Act of the law of bankruptcy) all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the company, a just estimate being made, so far as possible, of the value of such debts or claims as may be subject to any contingency or sound only in damages, or for some other reason do not bear a certain value." By s. 207 of the same Act, 1908, the rules of bankruptcy are to apply in the winding up of the company. Sect. 30 of the Bankruptcy Act lays down what debts are provable in a bankruptcy. Sub-s. 3 of

(1) [1920] 2 Ch. 554. (2) L. R. 10 Ch. 648.
(3) [1924] 2 Ch. 339.

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s. 30 reads as follows: "Save as aforesaid, all debts and liabilities, present or future, certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order, shall be deemed to be debts provable in bankruptcy," and by sub-s. 8 "liability" for the purposes of the Act is to include (*b*) "any obligation or possibility of an obligation to pay money or money's worth on the breach of any express or implied covenant, contract, agreement, or undertaking, whether the breach does or does not occur, or is or is not likely to occur or capable of occurring, before the discharge of the debtor" and (*c*) "any express or implied engagement, agreement or undertaking, to pay, or capable of resulting in the payment of money, or money's worth; whether the payment is, as respects amount, fixed or unliquidated; as respects time, present or future, certain or dependent on any one contingency or on two or more contingencies; as to mode of valuation, capable of being ascertained by fixed rules or as matter of opinion." Within the above definitions it seems clear that Mr. Pitts can prove in the liquidation for the amount of the policy money. It was, throughout the currency of the policy, a liability of the company contingent upon Mr. Pitts' life and his continuance in the due payment of the annual premiums. At the date of the presentation of the petition the policy had not strictly, under the conditions endorsed upon it, a surrender value such as to entitle the holder to one of the alternative options therein provided, because under them no surrender value is allowed to a policy which has been charged; but the charge could have been cleared away, and a surrender value once more obtained. More than that, it may be safely said that the policy had at that time a quantitative value seeing that maturity of the policy was approaching, only one premium remained to be paid, and the debt charged on the policy was 114*l.* and interest only. As Buckley L.J. said in *In re Law Car and General Insurance Corporation* (1): "What the

(1) [1913] 2 Ch. 126.

policy holder is entitled to is the value of the contract at the date of the winding up, ... which as at that date is to be taken to have come to an end."

Sect. 31 of the Bankruptcy Act, 1914, provides for a set-off to be allowed in the case of mutual debts, mutual credits and mutual dealings. This s. 31 replaced s. 38 of the Bankruptcy Act, 1883, which in turn replaced s. 39 of the Act of 1869. The three sections are similar in terms and effect, subject to words necessary to make them fit into the system of bankruptcy under each Act. It is right to observe that the principle of allowing set-off in bankruptcy proceedings has been continuously enlarged. "Mutual dealings" were added in 1869 to "mutual debts" and "mutual credits" which had been previously the words used in the earlier statutes regulating the right of set-off in bankruptcy. As Lord Russell of Killowen C.J. said in the case of *Palmer* v. *Day & Sons* (1): "The section in its present shape, however, has been held applicable to all demands provable in bankruptcy, and so to include claims as well in respect of debts as of damages liquidated or unliquidated provided they arise out of contract." He traces in that case the several changes which have been made in this clause as to set-off, and emphasizes the fact that it has been steadily enlarged. By s. 30, sub-ss. 4 and 5, of the Bankruptcy Act, 1914, an estimate of the liability provable is to be made by the trustee subject to an appeal to the Court. In the liquidation of a company under s. 206 of the Companies (Consolidation) Act, 1908, a just estimate is to be made of the liability. This method does not prevail in the winding up of assurance companies. By the Assurance Companies Act, 1909, s. 17, it is provided that the value of a policy or of a liability under a policy in the winding up of an assurance company is to be measured in accordance with the rule set out in the Sixth Schedule to that Act. This mode of measuring the liability, however, does not alter its character.

Apart from authority, it would seem that the liability of an assurance company upon its policies measured as above

(1) [1895] 2 Q. B. 618, 621.

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forms a mutual debt or mutual dealing with its holder who has borrowed money on the policy from the assurance company. An illustration of a set-off in such a case is to be found in *Sovereign Life Assurance Co.* v. *Dodd* (1), where it may be noted that premiums on the policy were paid after the petition to wind up, so that, as in the case here, the policy had not completely matured before the winding up. The Court in that case distinguished the decision in *Ex parte Price* (2) on the ground that set-off was raised by way of defence to an action by the liquidator.

In *Lee & Chapman's Case* (3) the question of set-off again arose. It was a set-off as between a sum due on the one side, and a measure of damages claimed on the other. There had been a charge upon one of the sums to be set-off, but which did not go to the full sum estimated to be the amount of the sum due. Brett M.R. says: "That charge has diminished the amount which I now have to deal with as between the liquidator and the Commissioners. But the moment that I come to consider the rights as between the Commissioners and the liquidator, and to consider them as if no charge had been made, I am driven back on what I have said before. As between them this claim to damages can be proved in the winding up. The moment I come to that conclusion, I must hold that the Bankruptcy Act, 1869, s. 39, applies, and that the claim of the Commissioners is to be treated by way of set-off, and they are entitled to say that they cannot be called upon to pay more than the amount which they owed the company diminished by that which the liquidator owed them for these damages." Cotton L.J. in the same case says (4): "In my opinion . . . . . mutual dealings in respect of which there are these cross claims are capable of being proved in the liquidation as well as the other claim which the liquidator has as against the Commissioners. And why should it not be? It is argued that this is not a liability at the time because there was no breach. At the time when the company commenced its liquidation,

(1) [1892] 2 Q. B. 573.
(2) L. R. 10 Ch. 648.
(3) 30 Ch. D. 216, 222.
(4) Ibid. 224.

it was under a contract which implied a liability to maintain these streets if it were required." It is to be observed that s. 31 is definite in its terms that where there is a mutual credit, mutual debt or other mutual dealings, the sums are to be set-off and the balance of the account and no more shall be claimed or paid on either side respectively. It is not merely permissive, but it is a direct statutory enactment that the balance only is to be claimed in bankruptcy.

In *In re Daintrey* (1) the Court of Appeal held that there was a set-off in bankruptcy of a claim for damages against a debt due. The case is important. Daintrey owed Messrs. Mant 83*l.* Messrs. Mant owed, or might owe, Daintrey up to a sum of 300*l.* Lindley M.R. observes that there was some sum payable under the agreement and says: "How can the trustee insist upon having 20*s.* in the pound from Messrs. Mant, and say that Messrs. Mant must be content with a dividend on the debt due to them from Daintrey?" and Romer L.J. says this: "It was not necessary that the money payable under the agreement should be immediately payable to the bankrupt at the date of the receiving order; nor were the circumstances such that the account could be taken as between Messrs. Mant and the bankrupt at that date." The Court of Appeal affirmed the decision which had been given by Bigham J. and declined to accept the dissenting judgment of Wright J., a judge whose experience in bankruptcy no one would contest. Bigham J. in that case had said, speaking of the decision in *Sovereign Life Assurance Co.* v. *Dodd* (2): "It was enough, ... that there existed at the commencement of the liquidation a debt on the one hand and a liability, which in due course would mature into a debt, on the other." Again he says: "In the present case, there was a debt due by Daintrey on the one side and there was a transfer by him of his business on the terms that it should be worked so as to produce money payable to him on the other." Now Wright J. had founded his decision, if not entirely, at any rate substantially, upon

(1) [1900] 1 Q. B. 546, 561, 569, 571, 572, 574.
(2) [1892] 2 Q. B. 573.

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the decision of *Ex parte Price.* (1) He says: "In that case there was at the time of the bankruptcy a certain existing liability to make a payment at an uncertain future time, and it was held not the subject of a set-off, because there was no sum due which could be ascertained or made the subject of an account or set-off." That is the reasoning which he derives from *Ex parte Price.* (1)

In re Daintrey (2) was followed by *In re Taylor.* (3) In that case judgment had been given by Phillimore J. and he founded himself upon *In re Daintrey.* (2) He says: "Any obligation prospective or contingent to which the bankrupt is subject, and which, if it becomes an attaching obligation, will result in a money claim, is, under s. 37, sub-ss. 3 and 4, of the Bankruptcy Act, 1883, to be estimated as at the date of the receiving order, and if the obligation arises out of mutual dealings between the debtor and a creditor it is the subject of set-off." His judgment was accepted by Cozens-Hardy M.R., who says that he prefers to base his judgment upon the reasons assigned by Phillimore J.; and Buckley L.J. says: "They were debts in respect of a contract existing at the date of the receiving order, and by virtue of s. 38 there is necessarily a statutory set-off. The decision of this Court in *In re Daintrey* (2) is in my opinion directly in point."

Both *In re Daintrey* (2) and *In re Taylor* (3), are decisions of this Court, and are as binding upon this Court as the case of *Ex parte Price.* (1) It appears to me that they cut into the reasoning on which *Ex parte Price* (1) was decided. *Ex parte Price* (1) itself is from some points of view not easy to understand. There are parts of Mellish L.J.'s judgment which I find some difficulty in following, and James L.J. says at the end of his judgment that although there was no right of set-off, "each party will prove for what he can, the one in the liquidation and the other in the bankruptcy." Then he says: "When there is a dividend ascertained in both cases I suppose one sum will be set-off against the other."

(1) L. R. 10 Ch. 648. (2) [1900] 1 Q. B. 546.
(3) [1910] 1 K. B. 562, 568, 580.

I do not quite follow how he supposes that that would happen if there were no right of set-off at all, and that there was an independent proof in the liquidation and an independent proof in the bankruptcy. *Ex parte Price* (1) was decided before s. 10 of the Judicature Act of 1875 was passed. It was by that section that the system of bankruptcy was to be applied in the winding-up of a company. It had not been so applied before. So far as the reasoning on which it is based goes, the case seems difficult to reconcile with the other decisions of this Court to which I have referred: *Lee & Chapman's Case* (2) followed, as I have said, by *In re Daintrey* (3) and *In re Taylor*. (4) If it is necessary to choose between the authorities I must choose to follow the most recent decisions, and to say that *Ex parte Price* (1) belongs to the time when the wide terms of the mutual dealing section were not as fully applied as they now are. It appears to me that following the three cases to which I have referred, and recognizing that *Ex parte Price* (1) is binding upon this Court, but was a decision given at a time when the law stood not as it is to-day, when the advantage of the reasoning now known to us in the three cases to which I have referred was not available, the doctrine of *Ex parte Price* (1) ought not to be applied to the present case. Thus, in my judgment, Eve J. rightly decided the case of *In re National Benefit Assurance Co.* (5), and was right in following it in the present case, and, therefore, the appeal from his decision ought to be dismissed.

WARRINGTON L.J. The City Life Assurance Company is being wound up by the Court under an order made on July 17, 1923, upon a petition presented on June 30 of the same year. We have before us two appeals from an order of Eve J. on a summons issued for the purpose of determining certain questions arising in the winding up. The appeal, to which the judgment I am about to deliver relates, is from that

(1) L. R. 10 Ch. 648.
(2) 30 Ch. D. 216.
(3) [1900] 1 Q. B. 546.
(4) [1910] 1 K. B. 562.
(5) [1924] 2 Ch. 339.

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part of the order which declares "That the holders of ordinary branch life and endowment policies issued by the company who have borrowed money from the company on the security of mortgages of such policies in the form described as 'mortgage to secure private loan' mentioned in para 3 of the summons but whose mortgages have not been deposited with the respondents, Nathaniel William Hubbard and Charles Comins as such trustees as aforesaid are entitled to be credited with and to set-off against the amount secured by such mortgages the actual value ascertained in manner applicable to such policies provided by the Sixth Schedule to the Assurance Companies Act, 1909, of their said policies." This appeal was heard first, inasmuch as if we had held that there was no set-off in that case the question raised by the other appeal would not have arisen.

In the appeal now in question one Pitts was the holder of a policy dated December 27, 1897, for a sum of 232*l.* payable on December 28, 1923, or the earlier death of the assured, the premiums being paid annually on December 1 in each year. The last premium was therefore payable on December 1, 1923. In June, 1923, however, when the winding up commenced the policy was still current. In November, 1918, the assured executed an ordinary mortgage of the policy to the company to secure 114*l.* with interest at 5 per cent. The policy therefore created a claim against the company which at the date of the winding up was a future claim and subject, therefore, to the provisions of s. 206 of the Companies (Consolidation) Act, 1908, and s. 17 of the Assurance Companies Act, 1909, under which the claim has to be valued and admitted to proof for the value so ascertained. The relevant provisions of the Bankruptcy Act, 1914, which now regulate also the rights of the parties in the winding up, are as follows. [His Lordship read s. 30, sub-ss. 3 and 4, and sub-s. 8 (c) and s. 31, and continued :] Now a future debt, a debt not payable immediately, but payable in future, even payable subject to a contingency, is deemed to be a debt provable in bankruptcy and is, therefore, one of the liabilities referred to in s. 31 as a debt under a receiving order, in the expression "person

proving or claiming to prove a debt under the receiving order." The appellant contends that the order of Eve J., part of which I have read, is wrong, because he says that there can be no set-off inasmuch as the value placed upon the policy is not a debt due from the company and cannot be the subject of such an account as is mentioned in s. 31. He relies upon the case of *Ex parte Price* (1), a decision of the Court of Appeal, as being directly in his favour. He does not dispute that the position of policy holder and mortgagee constituted a mutual credit or mutual dealing, and he admits that if before the winding up the policy had become a claim there would have been a case for a set-off, as was decided in *Sovereign Life Assurance Co.* v. *Dodd.* (2)

The real question is: Are we bound by the decision of this Court in *Ex parte Price* (1) to decide that in this case there is no right of set-off? That was a case arising in bankruptcy, and the bankruptcy rules as to set-off did not then apply to winding up. Technically I doubt whether this Court is bound by such a decision, because it is a decision on a state of the law existing at that time but not now existing. But whether the Court is so bound or not, it would in ordinary cases be regarded as bound to follow such a decision unless the alteration in the state of the law provided some clear distinction. Now if I were unable to find a substantial distinction, and there was nothing else in the case, I should without hesitation follow *Ex parte Price* (1), leaving a superior Court to say whether that case was rightly or wrongly decided. But I do not consider myself bound to follow it for this reason, not that I find a substantial distinction between that case and the present, for I do not, but because I am quite satisfied that the two very learned judges who decided *Ex parte Price* (1) would not have come to the same conclusion had they had before them the cases which have been decided since July, 1875, in this Court, and I think I may add also in the House of Lords, having regard to *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (3) The first of those cases is

(1) L. R. 10 Ch. 648. (2) [1892] 2 Q. B. 573.
(3) 9 App. Cas. 434.

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Lee & Chapman's Case. (1) The facts of that case may be quite shortly stated. The company there in liquidation and being wound up had entered into a contract with the Commissioners of Sewers for the reconstruction of Queen Victoria Street. Under that contract at the date of the winding up there was due to them under the engineer's certificate a very considerable sum of money. Under a term of the contract they were under an obligation in certain events which happened after the date of the winding up to keep the street in repair for a period of years. The winding up of course amounted to a breach of that contract, or rather a repudiation of it which could be accepted by the other side as a breach, and which would give the Commissioners the right to an action for damages. But at the date of the winding up there was nothing actually due under that contract; in fact the contract had not become operative because the event had not happened and, therefore, any liability thereunder was a future liability and a contingent liability and one which would have to be estimated in the winding up. The question arose whether there was as between the company and the Commissioners a right of set-off between the sum due from the Commissioners to the company and damages, which were, of course, unliquidated damages, for the breach by the company of their undertaking to repair. That was one of the questions which came before the Court of Appeal. Brett M.R. said this: "The liquidator sues the Commissioners for the price of the work done under the contract. The Commissioners allege that they have a claim against the liquidator for damages which have been assessed, and as against him, by virtue of the Bankruptcy Act, 1869, s. 39, those damages are to be considered as damages which can be set off by the Commissioners against his claim. If there were no charge upon the claim of the company, it seems to me clear upon authority and upon the true construction of this section that the damages could be set off. But then a charge has been given to Lee & Chapman before the winding up. These damages for breach of contract until

(1) 30 Ch. D. 216, 221, 222, 223.

they were assessed were unliquidated. If there had been no winding up, could they have been set-off as a claim by the Commissioners against the company? Certainly not. They are not damages which can be set off under the contract. Then if they cannot be set off under the contract, the interest of the company is to have the payment for the work done not subject to this right of set-off." Then he goes off on another point which relates to the other appeal, and I do not propose to refer to it. Then he proceeds to deal with the question simply between the liquidator and the Commissioners, and he says: "Now I come to the question as between the liquidator and the Commissioners wholly irrespective of this charge, and to be considered as if this charge had never been made. That charge has diminished the amount which I now have to deal with as between the liquidator and the Commissioners. But the moment that I come to consider the rights as between the Commissioners and the liquidator, and to consider them as if no charge has been made, I am driven back on what I have said before. As between them this claim to damages can be proved in the winding up. The moment I come to that conclusion, I must hold that the Bankruptcy Act, 1869, s. 39, applies, and that the claim of the Commissioners is to be treated by way of set-off, and they are entitled to say that they cannot be called upon to pay more than the amount which they owed the company diminished by that which the liquidator owed them for these damages." It will be observed that the view taken by Brett M.R. in regard to this question of set-off depended upon this, that a claim for unliquidated damages which arose in the winding up was a sum which could be proved in the winding up. Cotton L.J. in the same case says this: "Of course, that breach"—that is the breach of the contract to repair—"has not occurred actually, but the company has put itself in such a position that it cannot possibly perform the contract, and the Commissioners are entitled to prove, although the notice had not been given at the date of the liquidation or at the date of the completion of the work by the liquidator; in my opinion there is a claim for damages

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capable, as the Vice-Chancellor thought, of being proved in the winding up. The question is whether it does not come under that mutual credit clause, sect. 39"—that is the section which corresponds with the present s. 31—"In my opinion it does: mutual dealings in respect of which there are these cross claims are capable of being proved in the liquidation as well as the other claim which the liquidator has as against the Commissioners. And why should it not be? It is argued that this is not a liability at the time because there was no breach. At the time when the company commenced its liquidation, it was under a contract which implied a liability to maintain these streets, if it were required. It is now rendered impossible by the winding up for the company to do that, and in my opinion, though no notice has been given before the commencement of the winding up, that is properly a liability the damages for which are capable of being proved, and, if capable of being proved, are capable under the mutual credit clause of being set-off against any claim by the liquidator as against the Commissioners."

The second of the cases was the case of *In re Daintrey* (1), and that is another example in which the Court of Appeal gave a decision in favour of the claim of set-off when the claim on one side required to be estimated and was not a debt immediately payable at the date of winding up. It is remarkable that *Ex parte Price* (2) was relied upon by the judge whose judgment was reversed, but there is no mention of that case in the judgments in the Court of Appeal. But both those judgments are clear upon the point that what has to be ascertained is whether the claim in question as to which set-off is raised is a claim which can be proved in the bankruptcy or the winding up, as the case may be.

In the present case the claim under the policy valued in accordance with the provisions to which I have referred is to be deemed to be, and therefore for the purposes of construction is, a debt provable in the bankruptcy. If it is a debt provable in the bankruptcy, then, according to the authorities to which I have referred, that is a debt to which the mutual credit

(1) [1900] 1 Q. B. 546. (2) L. R. 10 Ch. 648.

applies and there would be the set-off. The fact that the amount of such claim has to be ascertained in the manner provided for by the Companies Act, and in this particular case by the Assurance Companies Act, 1909, seems to me to be immaterial for this purpose. It is merely a means whereby the amount of the debt deemed to be provable in bankruptcy is to be ascertained, but it does not alter the nature of the debt, the value of which has to be ascertained, and it still remains, notwithstanding that, a debt provable in bankruptcy. It may be that technically the claim in this case comes immediately and in terms within the two decisions of *Lee & Chapman's Case* (1) and *In re Daintrey* (2) to which I have referred, because it may be that the true view in law is that the claim in respect of the future liability under a policy is a claim for damages for breach of contract. If that is so, then the result is that it comes exactly within the decisions of those two cases. But whether that is so or not, it seems to me that the principle of the decisions in those cases governs the case with which we have to deal. On the whole, then, I think we are not bound to follow *Ex parte Price* (3), but we are at liberty to decide in accordance with the principles laid down in the two cases to which I have referred of *Lee & Chapman's Case* (1) and *In re Daintrey*. (2)

This appeal, therefore, must be dismissed, and the result of course is that *Ex parte Price* (3) must be treated as overruled.

SARGANT L.J. I agree. Technically this is an appeal from a decision in this winding up, but substantially it is an appeal from a reported decision of the same learned judge in the case of *In re National Benefit Assurance Co.* (4) In some ways I think it preferable to deal with that decision, because here the particular appellant is a person whose case appears to be an exceptionally strong one, because there was only one premium to be paid by him before he would become entitled to the benefit of the policy. Perhaps it

(1) 30 Ch. D. 216.
(2) [1900] 1 Q. B. 546.
(3) L. R. 10 Ch. 648.
(4) [1924] 2 Ch. 339.

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may be for that reason that his case was selected out of those who are in the same position, but it is a test case, and we have to deal with it from the point of view of all the persons who were the holders of these policies and mortgaged them, whether their policies would become due in a very short time or whether they had only just effected them. Therefore, the general view expressed by Eve J. in the case to which I have referred becomes of especial importance.

I do not think I can do better than follow the decision of the learned judge in that case, with which I entirely agree, and follow the way in which he deals with the matter, because he deals first of all with the rules in bankruptcy as applied to the winding up of a company. That is what we have to deal with, and I wish to consider those rules in the first place quite independent of authority. When we consider s. 30, which provides what debts and liabilities are provable, and so on, I think it is impossible to avoid being struck with the extraordinary comprehensiveness of the language. Every conceivable kind of liability is made provable in bankruptcy. More than that, those liabilities when they are proved are to be deemed to be debts; they are notional debts for the purpose, of course, of applying to them the provisions of s. 31 under which the debts are to be set-off one against the other and the balance only paid. That was a feature that was very much stressed, and I think rightly stressed, by Mr. Clayton in his argument. All kinds of liabilities as well as all kinds of debts are made notional statutory debts, and then are set-off against one another, so that under s. 31 the balance only is payable.

If that is so, looking at the matter independently of authority, how can it be said that the amounts which are to be paid or assessed as the damages, or the moneys properly payable to the assured by reason of the company having broken their contract with him by going into liquidation —how can it conceivably be said that those sums are not liabilities made notional debts and capable of being set-off under s. 31 against the debts due to the company? The

mere fact that under the Assurance Companies Act the amount payable is to be ascertained in a broad way seems to me of no importance at all. That is merely quantifying the obligation and can have no effect I think upon the result of the quantification when obtained. It still represents a liability. It therefore is a notional debt, and has to be set-off under s. 31 against any debt due to the company meanwhile. That being so prima facie and apart from authority, it seems to me unquestionably that this set-off must be allowed as the learned judge has found.

Really the only difficulty in the way of the Court is the case of *Ex parte Price.* (1) With regard to that I think it is to be noticed that James L.J. put in the forefront of his reasons for coming to the conclusion that he did, that at that time the rules in bankruptcy had not been applied to the liquidation of a company, and although his decision was in the bankruptcy of Dr. Lankester, still the problem he had to consider was one, one-half of which was concerned with the liquidation of the company in which Dr. Lankester had a policy. He obviously felt, as Eve J. pointed out, what might have happened and that justice could not be done between the parties if on the one side you had an application of the rules of bankruptcy under which a balance only would be payable, and on the other side in a liquidation of a company no such rule was to be applied. Eve J. has pointed out the pecuniary results which might result from that in pounds, shillings and pence. But the injustice was obviously weighing on the Court in the decision to which they came.

Further, since that case there have been at least three cases in the Court of Appeal, the case of *Sovereign Life Assurance Co.* v. *Dodd* (2); *In re Daintrey* (3); and *Lee & Chapman's Case* (4), all of which seem to be inconsistent with *Ex parte Price* (1), if that is to be looked upon as being a general decision against set-off independently of the special and peculiar circumstances of that case.

In my judgment, both on the language of the statute and

(1) L. R. 10 Ch. 648.
(2) [1892] 2 Q. B. 573.
(3) [1900] 1 Q. B. 546.
(4) 30 Ch. D. 216.

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on the strong balance of authority, we ought to affirm the decision of the learned judge in this case and approve his decision in the corresponding case of *In re National Benefit Assurance Co.* (1)

STEPHENSON'S CASE.

POLLOCK M.R. In this case I take the facts that are necessary to explain the decision from the judgment of Eve J. "This insurance company in addition to issuing ordinary policies of life insurance evolved a certain scheme under which persons contributing by fixed sums by way of premiums for a certain period or certain periods were entitled at the end of those periods to obtain an advance from the company for the purpose of enabling them to purchase houses and business premises. The scheme involved this that the company received and retained the premiums which were paid antecedent to the right of the certificate holder to obtain an advance and after the advance was made the sums were actually retained by the company in order to provide a margin between the cost of the property and the mortgage debt and thereby secure the company from loss in the transaction should the property ultimately prove to be of less value than the purchase price. The certificate holders paying these moneys to the company were without any security for the retention of those funds by the company or for the safe and proper investment pending the time when they should be entitled to claim payment as creditors against the balance due on their mortgages, and accordingly the company in order to promote and sustain confidence in the minds of the subscribers to these certificates created a trust which, putting it shortly, contemplated this that they would from time to time put into the hands of the trustees under the trust deed funds adequate to repay if repayment became necessary the premium so paid by the certificate holders antecedent to the advances made to them and that the company and certainly the certificate holders probably contemplated that the securities purchased by the premiums

(1) [1924] 2 Ch. 339.

which were obtained, but for reasons which one can well appreciate what the company did from time to time was to hand over to the trustees of the deed the mortgages which they had taken from the holders of these certificates and from the persons to whom they issued policies of life insurance and the trustees in that way became equitable assignees of a large number of the mortgages executed in favour of the company by the holders of ordinary policies of insurance and by the certificate holders."

The question is whether the judgment given by Eve J. on the other point, which we have just affirmed, can be extended so as to include the case of policy holders and mortgagors whose mortgages were equitably assigned to the trustees of the trust deed antecedent to the winding up. In other words the claim here is by policy holders as against the liquidator of the company, but the policies have been assigned by equitable assignment to the trustees for the purposes indicated in the judgment of Eve J. The case is important, for I understand from the Bar that no less than 900 of these policies were assigned to the trustees, and something like 375,000*l.* was the sum for which they were held as security. However, shortly put the point still arises whether the system of set-off, which we have held in our reasoned judgment was applicable as between the simple case of a policy holder and the liquidator, applies as between a policy holder whose policy has been assigned and is now held by the trustees. It is quite clear that as between the assignor and the assignee an assignment is complete without notice given. If modern authority for that is needed it will be found in *Gorringe* v. *Irwell India Rubber and Gutta Percha Works* (1), where Cotton L.J. says: "It is contended that in order to make an assignment of a chose in action, such as a debt, a complete charge, notice must be given to the debtor. It is true that there must be such a notice to enable the title of the assignee to prevail against a subsequent assignee. That is established by *Dearle* v. *Hall* (2), but there is no authority for holding this rule to apply as against the assignor of the

(1) 34 Ch. D. 128, 132. (2) (1823) 3 Russ. 1.

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debt. Though there is no notice to the debtor the title of the assignee is complete as against the assignor." Therefore the company had assigned the policies of these policy holders by an assignment which was good as between them and the trustees as assignees.

If s. 31 is to apply, and a set-off is to be allowed, it must be upon mutual debts, mutual credits and mutual dealings. The characteristic of mutuality must be present. That, I think, is clear from a number of cases that have been decided and maintained throughout the whole period during which set-off based upon mutual credits and debts has been allowed in bankruptcy law. But if direct authority is required it can be found in *In re Mid-Kent Fruit Factory* (1), where Vaughan Williams J. says of this set-off section "the characteristic of mutuality must always be present," and Vaughan Williams J. was for a considerable time the learned judge in bankruptcy. The set-off clause does not apply when the credits or debts or dealings are not between the same persons, or where one of the persons was acting in a different capacity from that in which the dealings with the other were incurred. Thus in *Forster* v. *Wilson* (2), where Parke B. traces the course of this legislation, he says: "The object of this clause (originally introduced in a temporary Act, 4 & 5 Anne, c. 17, continued by 5 Geo. 2, c. 30, and now re-enacted by the 6 Geo. 4, c. 16) is not to avoid cross actions, for none would lie against assignees, and one against the bankrupt would be unavailing, but to do substantial justice between the parties, where a debt is really due from the bankrupt to the debtor to his estate; and the Court of King's Bench, in construing this clause (for it is the same clause in substance in the two last-named statutes), have held that it did not authorise a set-off, where the debt, though legally due to the debtor from the bankrupt, was really due to him as a trustee for another, and, though recoverable in a cross action, would not have been recovered for his own benefit." Those words were adopted and read in full by Lord Cairns in the case of *Ex parte Cleland.* (3) Lord Cairns

(1) [1896] 1 Ch. 567, 571. (2) 12 M. & W. 191, 203, 204.
(3) L. R. 2 Ch. 808, 813.

accepts the statement of the law made by Parke B. as a true exposition of the doctrine. It seems to me therefore that in the present case, having regard to the fact that these trustees have become the holders of the policies, there is no mutuality which will entitle the policy holders to set-off, as between them and the liquidator, the sums which are due to them upon the policy and, therefore, that s. 31 does not apply to the case.

It is suggested that there was an equity between the policy holder and the company that the policy holder should be able to invoke the principle of s. 31 if and when he required to do so, and that the company are not entitled to say that there is no mutuality, because under the dealings between the policy holders and the company the principles of s. 31 ought to have remained available to the policy holder. That argument does not, to my mind, carry weight. There is no equity that the rights which govern the parties, if and when s. 31 applies, should be always available. Sect. 31 appears to me to be applicable if and when there is a bankruptcy or winding up of a company, but until that time has come, the law which governs the rights of the parties is not in force and cannot be held to be an inchoate right which the policy holder had as against the company at the time when the winding up of the company had not been commenced or, indeed, thought of. If there were any equity it must arise, I think, out of the contract between the parties. Willes J. in the case of *Watson* v. *Mid-Wales Ry. Co.* (1) refers to the difference between the rights which accrue under the Bankruptcy Act and the rights which would give rise to an equity between the parties. He says: "It is necessary to show mutual credit; I do not mean in the sense of mutual credit under the statutory provisions of the bankrupt law, but in the sense of there being an agreement or contract made or to be inferred that one debt was to liquidate the other. Where the balance only is to be the debt, there is a clear equity that one of the parties is not to have any detriment by the act of the other. But here the debts are payable at different times. There

(1) (1867) 36 L. J. (C. P.) 285, 288.

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is nothing from which we can infer that one liability was to liquidate the other, or that the balance was to be considered due." It appears to me that in the present case those observations apply, and there is no equity arising, as I have already said, under the Bankruptcy Act, and there is no equity which would be implied arising out of the contract between the parties.

If it could be shown that there was an absolute right or an implicit right that the money which is to be received out of the policy alone was to be the source of payment of a debt, perhaps different considerations might arise; but the mortgage as it stands provides that there shall be a debt from the policy holder, and the contract express or explicit which is suggested by Willes J. does not appear to be available to the policy holder in this case. For these reasons therefore I am of opinion that the appeal from the decision of Eve J. fails and must be dismissed.

WARRINGTON L.J. In this case Eve J. has come to the conclusion that as between the class of policy holders and mortgagors on the one hand, to which the question relates, and the company on the other, there is no right of set-off as between the amount due on their policies and the amount of their mortgage debts; but he has done so because at the date of the winding up the mortgage debts and the securities for them had been effectually transferred by way of equitable assignment by the company to certain trustees for another class of policy holders. The result of that was, of course, that at the date of the winding up there was a debt due from the company to the policy holders, as we have already decided in the previous case, but there was no debt due from the policy holder to the company, because the debt which had been due from the policy holder to the company had been effectually transferred, as I have mentioned, to the trustees. Therefore at the date of the winding up there was no mutual credit or mutual debt which could come within the provisions of s. 31 and be set-off the one against the other.

In my opinion, quite independently of authority, that

decision is a right decision. But it is not independent of authority for the point precisely arose in *Lee & Chapman's Case* (1) to which I have already referred in my previous judgment. In that case the sum due to the company in liquidation from the Commissioners of Sewers had been charged by the company prior to the winding up in favour of Messrs. Lee & Chapman, and the question arose whether, as between the company on the one hand and Messrs. Lee & Chapman on the other hand, there could be a set-off of the amount due to the Commissioners under their contract and the amount due under the original contract between the two. That was decided in favour of Messrs. Lee & Chapman; so far as they were concerned there could be no right of set-off. Cotton L.J. expresses himself on this point in these terms: "As regards the assignees, Lee & Chapman, they stand in a different position. Before the commencement of the winding up the company had assigned to them the right of receiving to the extent of their debt the money payable under the contract. As regards that sum, there was no longer a mutual credit or the possibility of a mutual credit between the company and the Commissioners." Then, after a passage which I need not read, he proceeds to say this: "As against Lee & Chapman, the mutual credit clause cannot prevail, because it operates only as between the bankrupt and the person claiming to prove, not as between the person dealing with the bankrupt and some one to whom the bankrupt had previously assigned his interest in his contract."

It was recognized in argument that that decision in *Lee & Chapman's Case* (1) would be conclusive against the appellants but for one circumstance of distinction, and that was that in *Lee & Chapman's Case* (1) a notice of the assignment in favour of Lee & Chapman had been given to the Commissioners the day before the winding up, and that in this case no notice of the assignment had been given at all. In my opinion that distinction is immaterial. The argument founded upon it rests on what is with all respect, in my

(1) 30 Ch. D. 216, 224.

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opinion, a misapprehension of the effect of notice in questions of equitable assignment. The equitable assignment itself is absolute and complete whether notice is given or not. That was decided by this Court in *Gorringe* v. *Irwell India Rubber and Gutta Percha Works.* (1) The object of giving notice, and the only object, is to prevent or render difficult, first, any arrangements between the debtor and creditor which may be to the detriment of the assignee of the debt, and secondly, to prevent any subsequent assignee of the debt from obtaining priority over the original assignee who gives the notice, and it is only in reference to those matters that the notice becomes material. It seems to me, therefore, that notwithstanding the absence of notice this case is precisely within the decision in *Lee & Chapman's Case* (2), and that the mutuality which is necessary in order to apply the mutual credit clause of the Bankruptcy Act did not and does not exist. The decision, therefore, on that point, was right.

But then it was contended before us and, as far as I understand his judgment, it would appear not to have been contended before Eve J., that on the true construction of the mortgage deed and in the events which have happened there was a bargain between the mortgagor and the company as mortgagees that the mortgagor should in every event have a right of set-off; that is to say that the mortgagee should be only liable to pay the mortgage debt out of moneys payable under the policy. In my opinion, that contention is not justified by the deed. The deed contained an absolute covenant to pay. It also, it is true, contained a provision that so long as the mortgagor paid the premiums and the interest, and performed his other obligations under the deed, the debt could not be called in. That, in my opinion, does not amount to a contract that in all events the only fund to be looked to for payment of the debt should be the policy. If that had been the intention of the parties it would have been perfectly easy to insert that provision in the mortgage deed. That has not been done. In my opinion, therefore,

(1) 34 Ch. D. 128. (2) 30 Ch. D. 216, 224.

the contract on the part of the company was not to resort only to the proceeds of the policy for payment of their debt. In the events which have happened, there having been a winding up which has altered the relation of the parties, the right of set-off under the rule applicable in the case of winding up would have applied if it had not been for the assignment, but in face of the assignment, which has destroyed mutuality, it cannot be applied. The decision of Eve J. was, therefore, right, and this appeal ought to be dismissed.

SARGANT L.J. I have come to the same conclusion, but with some considerable reluctance as regards the last point which has been dealt with by Warrington L.J.

As regards the question of notice of assignment I entertain no doubt whatever. For the purpose of making the assignment effectual as between the assignor and the assignee it was quite unnecessary to give any notice at all. That has been completely settled by the case to which Mr. Grant referred and which my Lord has mentioned.

I think also that there cannot be any equity that the state of things at the time of the liquidation or bankruptcy shall be such that the equitable doctrine or the statutory doctrine of set-off shall apply between the parties. For the purpose of applying that doctrine you have to find what is in fact the position of the parties at the relevant date—namely, the date of liquidation. If it so happens that at that date there are mutual debts or mutual liabilities deemed to be debts, then those have to be set-off against one another. But I do not see that any person is entitled to ask to be put in the same position as if there were still that mutuality, which has in fact been displaced by the action of the parties.

I come to the question of the bargain between the parties as contained in the mortgage itself, and I must say for myself that I think here the policy holder really has been very hardly treated and is in a position in which he could not reasonably have expected to be placed, because he borrows money from the company itself and he makes this express bargain with

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the company, that so long as he pays interest on his mortgage and pays his premiums the debt shall not be called in. Therefore, he would naturally, I think, feel that he was not in the position of an ordinary debtor at all. If he works out his policy bargain he will at the conclusion of the policy term become entitled to a present sum of money as against which, I think, there would be held to be a set-off of the amount owing by him in respect of the mortgage debt. What has happened? The company has gone into liquidation and has rendered it practically impossible for him to perform those conditions by virtue of which he would in course of time have been liberated altogether from this debt and have received his policy moneys. Then he finds that in consequence of there having been an assignment to trustees, the mortgage debt is owing to some other persons, and although those other persons are, of course, bound by the contract in place of the persons who assigned to them, still there is not in terms any possibility of the policy holder performing that special bargain by virtue of which he will be liberated from payment of his debt and will receive the balance of his policy free. All that seems to me to be a very unexpected result, and one which the policy holder, however prudent, would hardly have been likely to contemplate. I have been searching diligently to see whether out of that I can find anything amounting to a contract or an equity or a bargain within such a phrase as my Lord has quoted from the judgment of Mr. Justice Willes. Having done my very best in that respect I am unable to find that there was a bargain between the policy holder and the company under which in all events there was to be a set-off of the mortgage debt against the policy moneys. Therefore, I am still less able to find a set-off as between the mortgage debt by contract and the sum which becomes payable under the Assurance Companies Act, 1909, for breach of the bargain by the company in respect of the policy. So, reluctantly and feeling that there is really great hardship upon the prudent policy holders of this class, I am driven to concur with the other two members of the Court, and to affirm the decision of Eve J. But I do think

there is a real hardship here upon the policy holder who has borrowed money and whose mortgage debt happens to have been transferred to these trustees, and if any higher Court could find an equity in his favour I should be only too pleased.

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Solicitors for the appellant Grandfield: *Stow, Preston & Lyttelton.*

Solicitors for the respondent Pitts: *Maxwell, Simpson & Batley.*

Solicitors for the appellant Stephenson: *Coburn & Co.*

Solicitors for the respondent trustees: *Johnson, Jecks & Colclough.*

Solicitors for the liquidator: *Peter Thomas & Clark.*

R. M.

In re BLACKWELL.

BLACKWELL *v.* BLACKWELL.

C. A. 1925 *Dec.* 14, 15.

[1924. B. 6077.]

Will—Construction—Real Estate—Vested and contingent Interests—Devise to Eldest of Testator's Sons (if any) "who shall be living at the time of my death absolutely upon his attaining the age of twenty-one years"—Accumulations.

A testator devised his real estate, subject to certain interests, in favour of his wife during her widowhood, upon trust for the eldest of his sons (if any) "who shall be living at the time of my death absolutely upon his attaining the age of twenty-one years," and, failing such son, then he directed that the same should be held upon the trusts concerning his residuary estate. The testator died in October, 1912, leaving one son and three daughters, all of whom were infants. The testator's widow remarried in 1917. The trustees had accumulated certain of the rents and profits of the real estate. Questions having arisen owing to the claims for super tax in respect of the income of the son, a summons was taken out for the purpose of having it determined what interest the son took, on the death of the testator, in the real estate:—

Held, that the son became, on the testator's death, entitled to the real estate contingently on his attaining the age of twenty-one years, and also took a like interest in the accumulations.

Decision of Tomlin J. [1925] Ch. 312 affirmed.

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APPEAL from a decision of Tomlin J. (1)

Walter Reginald Blackwell, by his will dated December 13, 1909, devised to his trustees his freehold estate at Oxhey, near Watford, upon trust to allow his wife to reside there during her widowhood, and, subject to her interest therein, he directed his trustees to hold the same, together with his freehold property at Bushey and his freehold premises, 21, Soho Square, upon trust for the eldest of his sons (if any) "who shall be living at the time of my death absolutely upon his attaining the age of twenty-one years," and, failing such son, then he directed that the same should be held upon the trusts concerning his residuary estate. Then he gave his residuary estate to his trustees upon trust for sale and conversion, and he conferred upon them certain powers in relation to any property for the time being unconverted, including a direction to offer 21, Soho Square, to his brother at a certain price "in the event of my leaving no son who shall inherit the same under the provisions hereinbefore contained." The trusts declared of residue were, subject to certain annuities in favour of the testator's wife, for "my child if only one wholly or for all my children (including my said eldest son) if more than one in equal shares and to be an interest or interests absolutely vested on my death." Then there was a substitution of issue for a child dying in the lifetime of the testator. The will also contained a power of advancement out of the capital or share to which each child was entitled under the will, and the trustees were empowered to apply "the whole or such part as they he or she shall think fit of the annual income of the property or share to which any infant shall be entitled or contingently entitled under this my will or any codicil hereto in or towards his or her maintenance and education or otherwise for his or her benefit," with a direction to accumulate any surplus and add it as capital, "to the property or share whence the same shall have arisen." (2)

The testator died on October 10, 1912, leaving a widow and

(1) [1925] Ch. 312.

(2) The provisions of the will are fully stated in the report of *Inland Revenue Commissioners* v. *Blackwell* [1924] 2 K. B. 351; [1926] 1 K. B. 389.

four children, three daughters and one son, the defendant, Thomas A. W. Blackwell, who was born on April 12, 1912. The widow of the testator remarried on April 18, 1917. The trustee had from time to time accumulated the whole of the net income derived from the specifically devised real estate. Questions having arisen owing to claims for super tax in respect of the income of T. A. W. Blackwell, the trustees of the will took out this summons asking: (1.) whether, according to the true construction of the will, the defendant, T. A. W. Blackwell, became on the testator's death indefeasibly entitled in possession to the freehold property in question for an estate in fee simple, notwithstanding that he had not attained the age of twenty-one years; (2.) if not, whether he took a vested equitable interest therein in possession, liable to be divested on his dying under the age of twenty-one years, or merely an equitable interest contingent upon his attaining that age; and (3.) whether he took an interest, of a like nature, whether vested or contingent, in the accumulations of the rents and profits of the specifically devised real estate.

Tomlin J. held that the son became, on the testator's death, entitled to the real estate contingently on his attaining the age of twenty-one years, and also took a like interest in the accumulations.

The Crown, by leave of the Court of Appeal, appealed. The appeal was heard on December 14 and 15, 1925.

Beebee (*Sir Thomas Inskip S.-G.* with him) for the Crown. The question in this case is whether the son took a vested or contingent interest in the specifically devised real estate. The general rule is thus stated in Hawkins on Wills, 3rd ed., p. 282: "In the construction of devises of real estate, it has long been an established rule for the guidance of the Courts . . . . that all estates are to be holden to be vested, except estates in the devise of which a condition precedent to the vesting is so clearly expressed that the Courts cannot treat them as vested without deciding in direct opposition to the terms of the will." The authorities show that a gift to a person "when he attains twenty-one" is ambiguous, and may

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from the context indicate the time when his interest vests in possession as distinct from interest.

It must be admitted that a mere devise to A. when he attains twenty-one without (*a*) any context to explain or assist the Court, (*b*) any intermediate interest in trustees or other persons, or (*c*) any gift over or under twenty-one is contingent : *In re Francis.* (1) The present case, it is submitted, falls within the rule established in *Boraston's Case* (2), which is thus stated in Hawkins on Wills, 3rd ed., p. 282 : "If real estate be devised to A. when he shall attain a given age, and until A. attain that age the property is devised to B., A. takes an immediate vested estate, not defeasible on his death under the specified age ; the gift being read as a devise to B. for a term of years with remainder to A." : see also *Goodtitle* v. *Whitby* (3) ; *Manfield* v. *Dugard.* (4)

Tomlin J. in the present case has treated it as being unquestionable that there is here no intermediate interest given to a third party and that the rule in *Boraston's Case* (2) therefore does not apply. This, it is submitted, is not correct, because there is an express devise to the trustees of the estate near Watford known as Oxhey Place and all land held therewith upon trust to allow the widow to occupy part or to receive the rent. The effect of this intermediate interest in the trustees was to vest this part of the estate at any rate in the infant.

Trustees may take an estate by implication without express devise if upon the whole will this is necessary to enable them to perform the duties imposed upon them by the will : *In re Earl of Stamford and Warrington.* (5) Indeed in the present case the eldest son who obviously takes some interest in all the land in question must take it by implication, as there is no express devise to him at all, but merely a direction to the trustees to hold the land in trust for him. It cannot, it is submitted, be the correct construction of the will that the eldest son takes a vested interest in part and a contingent

(1) [1905] 2 Ch. 295.
(2) (1587) 3 Rep. 19*a*.
(3) (1757) 1 Burr. 228.
(4) (1713) 1 Eq. Cas. Abr. 195.
(5) [1911] 1 Ch. 255, 266, 267.

interest in the remainder of what the testator directs to be held in trust for him as one whole gift. In the will itself there is an express power given to the trustees to let any of the unsold real estate and to accept surrenders of leases and also a power to apply the income of the property for the maintenance of the infant, which require the trustees to have some estate or power over the property. It is submitted therefore that not only was Tomlin J. wrong in taking the view that there was no intermediate interest in the trustees, but that the interest in fact extended to the whole of the infant's property and that it was therefore vested within the rule in *Boraston's Case*. (1)

There is moreover a very strong context in favour of the gift being vested at the birth and not contingent upon the son attaining twenty-one apart from any such intermediate interest. In the first place the specifically devised property is expressly directed to fall into residue if there is no son at the testator's death—not if there be no such son who attains twenty-one. There is not much force in this point taken by itself, because of course without any express direction if the specific devise failed for any reason, the property passes under the residuary devise. It is however one of several indications.

It is submitted, however, that considerable importance is to be attached to the expression: "In the event of my leaving no son who shall inherit . . . . under the provisions hereinbefore contained." The word "inherit" prima facie refers to something taken at the death of the ancestor, not to an interest which may possibly not arise until nearly twenty-one years afterwards. This is emphasized by the fact that if the son does not "inherit" the options given to the testator's brother over 21, Soho Square, are to be exercised within twelve and eighteen months respectively after the testator's death—not after his death and failure of his son to attain twenty-one. If there is a son living at the death his "inheritance" is not to be sold to his uncles. Surely the testator must have had in mind that his son took a vested interest, and therefore the options would be repugnant to his absolute estate. These considerations, it is submitted, outweigh the point taken by Tomlin J.,

(1) 3 Rep. 19*a*.

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which he admits is of small weight, that the power to maintain refers to property to which the infant is "contingently entitled." He overlooks the words "or any codicil hereto." The contingent interest need not therefore arise under the will itself, but might arise under a future codicil.

The power to maintain the son out of the rents and profits—at any rate if the trustees take an estate and not a mere power—is practically conclusive in favour of the son's interest being vested: *James* v. *Lord Wynford.* (1)

In the case of the house and grounds and five acres to be occupied by or let for the benefit of the widow the son is to take his interest "after the death or remarriage of my said wife"—that is, subject to her interest—not after her death or remarriage and his attaining twenty-one: see *Andrew* v. *Andrew* (2), which was a strong case of the vesting of a prima facie contingent gift.

That the context generally will show the gift to be vested and not contingent is also recognized in *In re Francis* (3); *Phipps* v. *Ackers.* (4)

Tomlin J. has dealt with the present case on the footing that it fell within the class of cases of which *Phipps* v. *Ackers* (5) is an example. In that case there was a devise to A. when he should attain the age of twenty-one years, and a gift over in the event of his dying under that age, and it was held that an equitable estate in fee vested in A. immediately on the testator's death liable to be divested in the event of his dying under twenty-one. That case however is distinguishable from the present on the ground that there no intermediate interest was given to the trustees.

James v. *Lord Wynford* (6) shows that there is a difference according to whether the gift is of realty or personalty.

As to how far a power to apply income for maintenance will vest an otherwise contingent gift see *In re Ussher.* (7)

[WARRINGTON L.J. That was a case of a direction to apply

(1) (1852) 1 Sm. & Giff. 40, 59.
(2) (1875) 1 Ch. D. 410, 417, 418.
(3) [1905] 2 Ch. 295.
(4) (1842) 9 Cl. & F. 583, 591.
(5) 9 Cl. & F. 583.
(6) 1 Sm. & Giff. 40.
(7) [1922] 2 Ch. 321.

not a mere power to apply, and the direction to apply was held to be equivalent to a gift of the income.]

There is no distinction between a trust and a power for this purpose.

Looking at the will as a whole the scheme is to give the son a vested interest in the whole of the specifically devised realty with an estate of freehold in the trustees during the widowhood of the testator's wife in part and a term during the minority of the son in the rest or powers vested in the trustees for the purpose of its management during his minority until he can take effective possession on attaining twenty-one.

[He also referred to *Ex parte Wynch* (1); *In re Hotchkys* (2); Fearne on Contingent Remainders, 9th ed., pp. 240–247.]

Cunliffe K.C. and *Vernon* for the three daughters, *Dighton Pollock* for the son, and *Nicholson Combe* for the trustees, were not called upon to argue.

POLLOCK M.R. This is an appeal from a decision of Tomlin J. upon an originating summons which was taken out under the following circumstances: Walter Reginald Blackwell died on October 10, 1912, having made his will, which was dated December 13, 1909. He left him surviving his wife, one son, Thomas A. W. Blackwell, and three daughters, and all these four children are minors. An assessment to super tax was made in respect of the interest which was taken by the son under his father's will, and on an appeal the Commissioners decided that the income of the minor was not receivable by him, and they discharged the assessment. From that decision there was an appeal to Rowlatt J., who on July 7, 1924, upheld it, but on somewhat different grounds from those on which the Commissioners acted. From Rowlatt J.'s decision there was an appeal, which came before this Court on November 24, 1924. It then appeared that in order definitely to decide whether or not there was a liability in respect of the assessment it would be necessary for us to know with certainty what was the right construction of the testator's will, and to ascertain whether or not his son, T. A. W. Blackwell, took a vested or contingent

(1) (1854) 5 D. M. & G. 188. (2) (1886) 32 Ch. D. 408.

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interest in certain lands which were the subject of the will. We thought therefore that the right course was to take a step which would secure a proper decision upon the point of the true construction of the will, and so we adjourned the further hearing of the appeal, and the parties undertook that an originating summons should be taken out asking for the proper interpretation of the will. Accordingly, that procedure having been adopted, Tomlin J. on February 4, 1925, gave the decision (1) from which this appeal is now brought. He held that the son became entitled to the real estate contingently only on his attaining the age of twenty-one years.

Mr. Beebee, who appears in the case with the Solicitor-General, has argued the case before us, because the Crown are interested in the matter, and have to protect the rights of the Revenue. I do not know what may be the actual decision, or what may be the rights of the parties in the appeal from Rowlatt J. I have only referred to the fact that there is such an appeal in order to explain how this point arises for our decision to-day. Mr. Beebee has presented to us an able and strenuous argument to show that Tomlin J. came to a wrong decision.

Now the point really must ultimately turn upon the construction of the will, and the critical passage is this: "I direct my trustees to hold my said Oxhey Estate"—that is an estate which was given upon trust for his widow for life on certain terms—"and the land at the time of my death held therewith or otherwise situate in or near Watford aforesaid including after the death or remarriage of my said wife my said house and grounds and the land surrounding the same and also my property in the village or parish of Bushey and my interest in No. 21 Soho Square London Upon trust for the eldest of my sons (if any) who shall be living at the time of my death absolutely upon his attaining the age of twenty-one years and failing such son then I direct the same to fall into and be held upon the same trusts as are hereinafter declared concerning my residuary estate."

(1) [1925] Ch. 312.

Mr. Beebee has called our attention to a number of rules, but it is sufficient for my purpose to refer to the following rule as stated in Hawkins on Wills, 3rd ed., p. 282: "In the construction of devises of real estate, it has long been an established rule for the guidance of the Courts . . . . that all estates are to be holden to be vested, except estates in the devise of which a condition precedent to the vesting is so clearly expressed that the Courts cannot treat them as vested without deciding in direct opposition to the terms of the will." If that rule is followed there is a leaning towards a construction of a will as giving a vested rather than a contingent interest. We have therefore to decide whether or not the words "for the eldest of my sons (if any) who shall be living at the time of my death absolutely upon his attaining the age of twenty-one years" give a vested or contingent interest to the son. As a matter of fact there was not more than one son, the other three children were daughters; but the possibility is indicated that there might have been several sons, some of whom might not be living at the death of the testator. It might be that a son secondly or thirdly born to him, might become the eldest son for the purpose of this trust.

Now dealing first with *Boraston's Case* (1), it is clear that in using words which apparently are words of time you may find that instead of being words of time they are words of contingency, or you may find that words of contingency are words of time. It is there stated: "So that these adverbs (*then* and *when*) in our case, are demonstrations of the time, when the remainder to Hugh shall take effect in possession, as in the said cases of a lease for life, and lease for years, and not when the remainder shall vest." Mr. Beebee says that these words of time inserted in the present case are words which have merely the effect of postponing the time when possession shall be taken by the son, and are not words of contingency. I do not propose to go through the cases which have been cited, or again to refer to the views stated in and cited from Mr. Hawkins' book on Wills. It is sufficient for

(1) 3 Rep. 19*a*, 21*b*.

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my purpose to say that I agree with the reasoning of Tomlin J. and the conclusion which he has reached.

It appears to me that Tomlin J. has rightly construed this sentence as " for the eldest of my sons (if any) who shall be living at the time of my death " and then " absolutely upon his attaining the age of twenty-one years." The effect of the construction for which Mr. Beebee contends would, I think, be to rule out the word " absolutely," and to alter that sentence in a manner which is not justifiable. I can follow the argument that the word " absolutely " is not to be taken as meaning absolutely when you have regard to the rules under which you are bound, if possible—I will put it as high as that—to hold that there is an immediate vesting, and that one ought to decide in favour of the vesting unless there is a condition precedent to the vesting so clearly expressed that the Courts cannot treat the gift as vested without deciding in direct opposition to the terms of the will. Applying that rule, Mr. Beebee says that the word " absolutely " is given too great prominence, and that if you take the clause as a whole and the other parts of the will and the direction as to residue and the like, the word " absolutely " does not stand as a barrier against the construction for which he contends. Giving full weight to that argument, the word " absolutely " does seem so to stand, and I think Tomlin J. has come to a right conclusion in dividing the sentence in the manner he has done. Lastly I make this observation : in *In re Ussher* (1) before Neville J., to which our attention was called and which was cited before the Commissioners, the question arose as to the effect of a direction to the trustees to apply the whole or such part as they might in their absolute discretion think fit of the income for the maintenance education or benefit of the person presumptively entitled to the residuary estate. That case appears to me to have been decided upon the direction contained in the will, and, as I pointed out in the course of the argument, both in that case and also in *In re Hume* (2), decided by Parker J., the fact that there was such a direction loomed somewhat largely in their ultimate

(1) [1922] 2 Ch. 321. (2) [1912] 1 Ch. 693.

decisions. Parker J. took the direction as having the same effect as a gift. If you could take the words in this will as equivalent to a direction there would be parity of reasoning in Mr. Beebee's argument, but it is clear that both in the maintenance and in the advancement clauses there is only a power to the trustees, and that there is no direction as there was in *In re Ussher* (1) and in *In re Hume.* (2) That may not be a strong point, but it is an observation which I think is worth making. It appears to me upon the reasoning of Tomlin J., with which I have already said I agree, and having regard to the difficulty I have in attributing a different meaning or interpretation to the will, that Tomlin J. has come to a right conclusion, and therefore that this appeal must be dismissed.

WARRINGTON L.J. I am of the same opinion. The question to be determined is whether on the true construction of the will of the testator the gift of certain real estate to the testator's son is a vested or contingent gift, contingent, if it be so, on the son attaining the age of twenty-one years. The terms of the gift itself are these : Certain real estate having been devised to trustees they are directed to hold it " Upon trust for the eldest of my sons (if any) who shall be living at the time of my death absolutely upon his attaining the age of twenty-one years and failing such son then I direct the same to fall into and be held upon same trusts as are hereinafter declared concerning my residuary estate." The question in my opinion, and in this I agree with Tomlin J., is unfettered by any general rule, and the task of the Court is to determine whether on the terms of the whole will fairly read the estate is vested or contingent. I say advisedly that we are unfettered by any general rule, but of course from that I except those rules which apply to all questions of construction, such as, for example, that words are to have their natural meaning unless there be a context which shows that they bear a different meaning. I think I may also refer to another rule as in the same category : That the Court is inclined rather to

(1) [1922] 2 Ch. 321. (2) [1912] 1 Ch. 693.

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hold an estate to be vested than contingent if the words of the will will allow it to do so. Now two rules of the other and more special class of cases are suggested as binding the Court in this case. Those two rules are expressed by Tindal C.J. in *Phipps* v. *Ackers* (1) in giving the opinion of the judges to the House of Lords. He is there dealing with the vesting of apparently contingent devises of land, and he says (2): "And the cases on this subject appear to be resolvable into two classes: first, those in which the Courts have relied on the circumstance that the estate, prior to the attainment of the age of 21, has been given to some third person, either for the benefit of the devisee himself, as in *Goodtitle* v. *Whitby* (3), or for the benefit of some other persons to endure during the minority, as in *Boraston's Case* (4), and *Manfield* v. *Dugard* (5); and, secondly, those cases in which the estates are given over in the event of the devisee dying under 21," and then he cites certain cases, and for the future, I suppose the only case probably cited on that point will be *Phipps* v. *Ackers* (1) itself. Then he proceeds (2): "The first class of cases proceeds on the ground that the estate given to the devisee on his attaining 21, is in fact only a remainder, taking effect in its natural order, on the determination of the preceding estates; and that the attaining the prescribed age in such a case no more imports a condition precedent than any other words indicating that a remainderman is not to take until after the determination of the particular estates. The second class of cases goes on the principle that the subsequent gift over in the event of the devisee dying under 21, sufficiently shows the meaning of the testator to have been that the first devisee should take whatever interest the party claiming under the devise over is not entitled to, which of course gives him the immediate interest, subject only to the chance of its being devested on a future contingency." Now it is quite plain that the present case is not an instance of the second of those

(1) 9 Cl. & F. 583.
(2) Ibid. 591.
(3) 1 Burr. 228.
(4) 3 Rep. 16.
(5) 1 Eq. Cas. Abr. 195.

two classes of cases, for the reason that it is common ground, and I agree with the parties in this, that the direction that the estate is to fall into residue is not a gift over in the event of the testator's son failing to attain the age of twenty-one years. It is a gift over in the event of there being no such son at all, that is to say, no eldest son living at the testator's death, the words being "failing such son then I direct the same," and so forth. The case also in my opinion, and herein I agree again with Tomlin J., does not fall within the first of the two classes of cases described by Tindal C.J. There is not in this case, to adopt his words, a gift of the estate prior to the attainment of the age of twenty-one years to a third person either for the benefit of the infant devisee himself, or for the benefit of some other persons to endure during the minority. The gift in the will to the son in this case is an immediate gift, subject only to this, that as regards a part of it the gift cannot be enjoyed to the full until the death or second marriage of the testator's wife, because under a previous direction she is to enjoy the right to occupy the testator's residence and a certain limited area of land belonging thereto so long as she remains his widow. It is true that in addition to enjoying the right actually to reside there the widow, if she pleases, is given the right to receive the rents of the house and of that limited area of lands if she does not choose to reside; she is, in fact, to have the benefit of that; and the form which the gift to the son takes where the portions of land given to him are as described is in these terms: "Subject to my wife's interest in my said house and grounds I direct my trustees to hold my said Oxhey Estate and the land at the time of my death held therewith or otherwise situate in or near Watford aforesaid including after the death or remarriage of my said wife my said house and grounds and the land surrounding the same and also my property in the village or parish of Bushey." This is something which has not been spoken of at all before. "My property in the village or parish of Bushey and my interest in No. 21 Soho Square London." It is to my mind plain that that is in truth an immediate gift subject only to the

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rights which the wife enjoyed as I have said during her widowhood. It is not a gift in remainder in the strict sense, or even if it is a gift in remainder it would only be as to the very small part comparatively in respect of which the wife had the right of occupation. Now if the Court is not fettered by either of the two rules which appear to be embodied in the two classes of cases to which I have referred, then the only question is whether there is sufficient context in this will to convert words which, according to their natural meaning, are words of contingency into words which would confer an absolute estate and merely postpone the period of the unfettered enjoyment of that estate. The words are "for the eldest of my sons . . . . upon his attaining the age of twenty-one years." It is perfectly well settled, and the rule is expressed in the most recent times in *In re Francis* (1), that a gift upon attaining the age of twenty-one years without more is, according to its natural meaning, a contingent gift, and that nothing goes to the taker until he attains the fixed age. We have then to find whether there is anything in the context in the will which enables the Court—I will not say compels it, because the Court is inclined to take the course if it can—but enables the Court to hold that gifts prima facie contingent are really vested.

I agree with Tomlin J. that you can find nothing in this will when once you get rid of the supposed general rules which are said to control the unfettered expressions of our opinion, to indicate that this prima facie contingent gift is anything but contingent. The power conferred on the trustees to let is not in terms confined to the minority of the son. No doubt when he attains the age of twenty-one and becomes absolutely entitled he can if he pleases put an end to the trustees' powers, but in terms the power to let extends to any part of the testator's real estate which is for the time being unsold; so the power to manage in the same way extends to real estate for the time being unsold. The power to maintain is merely the ordinary common form power under which the person whose maintenance is in question has no absolute right to the

(1) [1905] 2 Ch. 295.

application of any part of the income; it is merely "to apply the whole or such part as they he or she shall think fit of the annual income of the property or share to which any infant shall be entitled or contingently entitled under this my will or any codicil hereto"—followed by a direction to accumulate the remainder and to add it to the property from which it arose. Now it seems to me that those provisions of the will are perfectly neutral so far as the interpretation of the actual gift is concerned. I say perfectly neutral, but I am not forgetting that there is contained in them an expression which if it has any effect at all tends to support the view that the gift of this estate to the son is a contingent gift, because the testator in the power to maintain uses these words: "to apply the whole or such part as they he or she shall think fit of the annual income of the property or share to which any infant shall be entitled or contingently entitled under this my will or any codicil hereto." Now the interests which this child and the other children took in the residue were vested at the testator's death, and the only estate devised by the will to which the son could be said to be contingently entitled is the estate in question. I do not attach much importance to it, but it is some indication.

Mr. Beebee has relied on another small indication as supporting his view of the true construction—namely, the fact that when the testator directs his trustees to offer the premises No. 21, Soho Square, to his brother at a price representing twenty years' purchase of the net rental thereof, he provides that the brother's option is to be exercised "within one year from the date of my death," and Mr. Beebee says that that indicates that the interest of the son is a vested interest at the death, but in my opinion that condition attached to the option is purely neutral. It throws no light upon the effect of the gift of No. 21, Soho Square, to the son. If it were a vested gift, still the gift would not be divested by the exercise by the testator's brother of that option; it is only an option to purchase; and the son, if that option is exercised, will become entitled to the purchase money. If the gift is contingent, still it may be that the testator would desire that his brother

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should exercise the option of turning that real estate into purchase money within a limited time. In my opinion the fact that the testator has fixed that limit of time throws no light upon the construction of the gift itself, less, even, than does the use of the words "contingently entitled" in the power to maintain.

On the whole, and for the reasons which I have endeavoured to express, and also so far as the supplementary reasons given by Tomlin J. are concerned, I think the conclusion at which he arrived was the true one, and that the gift of all the estates included in those words which I have already read, is a contingent gift, contingent on the son attaining the age of twenty-one, and not a vested gift.

SARGANT L.J. I am of the same opinion. There can be no doubt that the gift to the eldest son upon his attaining the age of twenty-one years, taken simpliciter, is not only a future gift but a contingent gift; but there are, as was shown in *Phipps* v. *Ackers* (1), two well known classes of cases in which a gift, prima facie contingent, may be turned into a vested gift. The first is the case where there is some intermediate gift, so that the words of futurity may be explained as being words of futurity only as in a gift in remainder; and the second is where there is a gift over, if the primary beneficiary does not attain the age of twenty-one years.

Now in the Court below the case was apparently argued on the second branch of the rule, on the second of the two classes of cases. I see that Mr. Dighton Pollock argued that the gift here was, on its true construction, a gift over on the eldest son living at the death failing to attain the age of twenty-one years, and it was to that that the learned judge mainly directed his attention. That now is given up. It is recognized by Mr. Beebee that the judge was right in saying that the occurrence of the word "absolutely" between the definition of the original beneficiary and the words "upon his attaining the age of twenty-one years" shows that the beneficiary contemplated was the eldest son who survived the

(1) 9 Cl. & F. 583, 591.

testator, and that the words " and failing such son " meant, not if the eldest son shall not attain the age of twenty-one years, but if there shall be no son surviving the testator. And, that being so, Mr. Beebee, in his very careful and interesting argument, has directed his attention to the other branch of the rule, and has sought to show that here there is in fact a gift substantially in remainder, so that the words " upon attaining the age of twenty-one years " may be construed as being simply and solely words of futurity, not importing any contingency at all.

Now in my judgment that is not the true construction of the will, and I agree with what Tomlin J. said, that there is here no intermediate interest within the rule in *Boraston's Case*. (1) In the first place, as regards the life interest that is given to the wife in a part of the hereditaments devised to the eldest son, it is noticeable that not only is that a part only, but in the gift to the eldest son there is a direct gift with immediate words, followed by the words : " including after the death or remarriage of my said wife my said house and grounds and the land surrounding the same," that is to say, the property with regard to which she was given the right of residence or letting during her widowhood. And it seems to me that that portion of the estate is treated rather as a less important part, as an accessory, and that the real substance of the gift is the gift of the whole in possession to the son, but subject as to a part only, and what is contemplated apparently as a minor part, to the right of the wife to occupy. Therefore I do not think that that right on the part of the wife can amount to an intermediate estate within the principle of *Boraston's Case* (1) and the cases that followed it. But then it is said that nevertheless there is to be implied a sufficient intermediate estate, for this reason, that the trustees have a general power of maintenance and a general power of application of such part of the rents and profits, not merely of the general residue in which the son has a share, but also of this particular real estate for the benefit of the son, and that that is sufficient to constitute what is an intermediate estate. In my opinion

(1) 3 Rep. 19*a*.

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that is not so. I think that a mere power of application of this sort cannot be held to amount to an intermediate estate so as to have the effect, on construction, of making that which is in terms the present gift to the son construable as a gift in remainder, so as to satisfy the word " upon."

It seems to me that in these cases it is of some importance to consider the general structure of the will and the order in which the different gifts occur. Here the gift to the son is a main, definite, principal gift in possession, and it is not until considerably later in the will, when the questions of advancement, maintenance, letting and so on are being dealt with, that these provisions as to the maintenance of the son and of the daughters of the testator or the younger children are inserted. In my opinion such a provision, amounting, as it does, not to a direction at all, but to a mere power, although it might no doubt extend to the whole income of the property, cannot be of real value in considering whether in the construction of the original gift the word " upon " is really a word which has reference to futurity only, because of an intermediate estate, or is a word connoting contingency. I think that the learned judge was quite right in saying, although he had not the advantage of the argument which has been presented to us, that there is here no intermediate interest for the purpose of satisfying the rules in *Boraston's Case* (1) and the cases that follow that case. That being so, I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitor for appellant : *Solicitor of Inland Revenue.*
Solicitors for respondents : *Charles Stevens & Drayton.*

(1) 3 Rep. 19*a*.

W. I. C.

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1925
Oct. 27, 28, 29, 30; *Nov.* 2, 3, 4; *Dec.* 21.

[1923. A. 2731.]

Local Government—Public Nuisance—Drainage System—"Sewer" or "Drain"—Vesting in Local Authority—Building Estate—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 13, 15, 19.

In 1896 a low-lying estate near the sea was purchased by McD. for the purpose of being developed as a seaside resort, and forty-eight houses were built. The drainage system adopted by McD. was disclosed to and approved of by the Rural District Council of the locality. It provided two methods for dealing with the sewage, the one by means of the ordinary cesspit, and the other by discharging the contents of the drains from the houses along three lines of pipes into settling tanks, and then raising the liquid therefrom to the surface by means of pumping, and finally disposing of it through sub-soil pipes radiating from a distributing chamber. The pumps were driven partly by an automatic windmill and partly by an electric motor. This drainage scheme was completed in 1902 and worked satisfactorily until 1912, when the defendant purchased from McD. the unsold part of the estate, and subsequently built sixteen further houses. No proper outfall for the solid matter of the sewage had ever been provided. In 1917 the pipes had gradually become blocked, and the pumping was then finally abandoned as useless. In 1918 sewage matter flooded some of the houses, and notice was served on the defendant under the Public Health Act requiring him to abate the nuisance. He endeavoured to do so by inserting on his own land some lines of pipes at certain manholes connected to surface water channels. As the result of a visit from an inspector of the Ministry of Health to the estate a letter was written on February 10, 1921, informing the Council that it was their duty, under s. 19 of the Public Health Act, to cleanse the pipes, as they were public sewers vested in them. The Council denied their liability, and in 1923 an action was brought by the Attorney-General at the relation of the Council against the defendant claiming an injunction to restrain him from continuing a public nuisance caused by the accumulation of sewage on his estate:—

Held, that the case did not come within *Meader* v. *West Cowes Local Board* [1892] 3 Ch. 18, and these lines of pipes laid with the approval of the relators were "sewers" within the Public Health Act and vested in them at the end of 1902; that the discontinuance of pumping in 1917 did not aggravate the nuisance; and the condition of things on the estate was attributable to the disregard by the relators of their statutory duties; and the action failed.

ACTION WITH WITNESSES.

This was an action by the Attorney-General, at and by the relation of the Dolgelly Rural District Council, against Sir Peter Peacock, claiming an injunction restraining him,

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his servants and other agents, from continuing the public nuisance caused by the accumulation of sewage in surface-water channels, sewage pipes, manholes, and tanks on the Fairbourne estate in the parish of Llangelynin, in the county of Merioneth. The history of the estate, its drainage system, and the result of the evidence are taken from the judgment of the Court as follows :—

"The estate—about 370 acres in extent—lies to the south of Barmouth on the Cardigan Bay coast, and is intersected by the Cambrian Railway and the main road from Dolgelly to Towyn. The portion to which this action relates is mainly that between the railway and the sea. This consists of a low-lying plain the mean level of which is some eighteen inches below the ordinary high water mark. It is protected from inroads of the sea by a high embankment. A large quantity of water descends on to this plain from the high land above the railway, and this, together with the rain water falling on the plain itself, is conducted by numerous channels, the principal ones being some 8 to 10 feet wide at the top, narrowing to 2 feet at the bottom, and of an average depth of 4 feet, to a spot in Barmouth estuary where there is an outfall, the mouth of which is closed by an automatic valve as the tide rises. The position of this outfall involves the valve being closed for about four hours during each tide, and in times of heavy rainfall the water in the channels is bayed back and not infrequently overflows on to the adjacent land. The subsoil is for the most part an impervious clay, and the plain was not inaccurately described by Mr. Rodwell as a wet, soft marsh.

In 1895 and 1896 Mr. Arthur McDougall purchased the property then let to Mr. Cadwalader Roberts for agricultural purposes only with the intention of developing it as a seaside resort. Pursuant to this intention he at once proceeded with the erection of several houses, and very shortly after his purchase the relators appointed a committee of their body to confer with McDougall and his engineer as to the system of drainage to be adopted for the estate. They met on the ground, and it was suggested by the committee, of which

Mr. Roberts (who gave evidence at the trial) was a member, that the drainage should be discharged into the sea, but to this the engineer responded that the Council would in that case have to pay for an outfall, and that the Barmouth people would probably object. Mr. Roberts could not remember the name of the engineer or having seen any plan of the proposed line of drainage, but date and other matters raise a strong presumption that the engineer was Mr. Bancroft and that the plan and section dated June 19, 1896, disclose McDougall's first proposals. Be this as it may, the committee did not accept such proposals, but reported to the Council an alternative suggestion put forward by the engineer which in substance dispensed with the outfall into the estuary and substituted a subsoil irrigation scheme as a temporary measure. Naturally after a lapse of thirty years Mr. Roberts' memory as to details was not very clear, but his evidence was accepted by both sides as truthful, and it established this, that the alternative temporary measure was assented to by the Council and carried out by McDougall. I do not accept all the evidence given as to the extent to which McDougall's work was supervised or tested by the Council's officials; the witnesses to these matters must I think have confused the laying and testing of house drains with the earlier operations, but the point is not of much importance now that the whole case has been heard, because there can be no reasonable doubt that the scheme which McDougall carried out was disclosed to and approved of by the Council.

The scheme provided two methods for dealing with the sewage, the one by means of the ordinary cesspit and the other by discharging the contents of the drains from the houses into and along lines of pipes until certain settling tanks were reached, and then raising the liquid therefrom to the surface by means of a pump and finally disposing of it through subsoil pipes radiating from a distributing chamber, or in one case, by pumping it direct into a disused clay pit.

No question arises with regard to the cesspits, but with regard to the lines of pipes into which the house drains

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discharge, the relators contend that for the reasons I shall hereafter state, these never became vested in them as sewers under s. 13 of the Public Health Act, 1875, and therefore that the provisions of the statute imposing on the local authority the duty of keeping in repair, cleaning and emptying of the sewers belonging to them, never had any application to these pipe lines. The defendant, on the other hand, maintains that the lines of pipes were all sewers at or shortly after the dates when they were respectively completed, and as such thereupon vested in and came under the control of the relators.

There are three such lines of pipes. The first receives the drainage from houses in Alyn Road; the second from houses in Belgrave Road, Beach Road, and Station Road; and the third, from a large house called 'Brackenhurst' and two or three smaller adjacent residences. The locations of these several premises and the relative positions of the several pipe lines are all disclosed on an agreed plan, exhibit B to the evidence of Mr. Rodwell.

It will be convenient to deal now with the first two pipe lines, leaving the 'Brackenhurst' line for later consideration. The pipes are of six inches diameter in each case, and the sewage from the Alyn Road houses passes through them into a Lancashire boiler used as a settling tank and situate at the eastern end of Alyn Road, which is about 100 yards long. In like manner the drainage from the houses in the other three roads is passed through six-inch pipes into two Lancashire boilers lying horizontally side by side and used as a pair of successive settling tanks with an aggregate capacity of about 2500 gallons. From the Alyn Road settling tank and from the second of the other two tanks a two-inch suction pipe communicates with a suction pump situate at a distance in the one case of 160 and in the other of 150 yards, and by these pumps, fitted at the lower end with a nozzle to prevent the raising of any solid matter, the liquid drawn from the settling tanks was raised to the surface and discharged into a pipe which carried it some 250 feet to a brick-built distributing chamber, from which,

as I have already stated, it was evacuated through several lines of field pipes.

The transition from the present to the past tense in the last preceding paragraph of this judgment is consequent upon the fact that owing largely to the dispute involved in this action, the pumps are no longer working, the pumping gear is derelict, and the connection between the outthrow from the pumps and the distributing chamber has apparently been in part destroyed.

When the pumps were in working order they were driven partly by an automatic windmill and partly by an electric motor now dismantled. The windmill would only work when there was sufficient wind blowing, and when there was too much wind, it was not infrequently wrecked.

'Brackenhurst' and the houses draining into this line of pipes are situate above the railway and the Dolgelly to Towyn road. In this case again the house drainage discharged into a line of six-inch pipes, and was carried to a settling tank from which through a two-inch suction pipe the liquid was pumped by means of a smaller automatic windmill and discharged into an old clay pit of considerable depth.

This installation or system of drainage was all completed by the year 1902. It has been severely criticized by the expert witnesses on both sides. The fall is said to be far too little, the suction pipes of inadequate diameter, involving by reason of the resultant friction a lift at the pump equivalent to 17 feet, and the windmill and motor incapable of dealing with anything like the quantity of sewage which it was reasonable to anticipate would be discharged into the pipes within a comparatively short time. Moreover it was pointed out that although provision—inadequate though it was—had been made for withdrawing the liquid, no proper outfall for the solid matter had ever been provided.

The truth of these criticisms cannot be gainsaid, but notwithstanding its many defects, the installation, according to the plaintiff's own witnesses, worked satisfactorily for something like ten years. 'Down to 1912,' says Dr. Hugh

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Jones, the relators' Medical Officer of Health from 1898 onwards, 'I did not find anything seriously wrong with the sewage.' In cross-examination he adds: 'I wanted to see the method that was being adopted for the disposal of the sewage, and was shown it in working by Mr. McDougall's agent. It was working very well then'; and his last answer in re-examination was: 'I had no cause to complain of inadequate working of the sewage system prior to McDougall's sale in 1912.'

By that time—that is 1912—McDougall had erected forty-eight houses, of which forty-four drained into one or other of the three pipe lines. In 1903 the relators had for the first time adopted by-laws under which plans of many of these houses, accompanied by written descriptions of the intended mode of drainage and block plans showing the intended lines of drainage and the intended size, depth, and inclination of each drain and details of the arrangement proposed to be adopted for the ventilation of the drains must have been submitted to and approved of by the relators, and the works when completed, including the connection of the drains with the pipe lines, been passed by their surveyor. McDougall had kept the pumps in repair and his agent had from time to time dealt with any complaints made by occupiers relating to the disposal of the sewage from their houses. He had also occasionally lifted the sludge from the settling tanks by a chain pump and had scattered it with an admixture of lime over the agricultural land. Amongst the covenants contained in the conveyance of one or more of the houses sold by McDougall was one to the effect that he would forthwith provide an effective sewer extending to the hereditaments thereby assured and connected with the main drainage system of the vendor's adjoining land, and would keep such sewer and drainage system in satisfactory and effective working order until taken over by the local authorities.

In 1912 the defendant purchased the unsold part of the estate from McDougall, and in the course of the next five or six years he erected another sixteen houses and connected the drains of three houses in Station Road with the line of

pipes behind Belgrave Road. This is the only increased burden put upon the installation since McDougall's sale. The defendant has also sold some of the houses built prior to his purchase and some of those he has since built. In and since 1917 the position has been this: sixty-four houses have been built between the railway and the sea, of which forty-seven drain into one or other of the lines of pipe in Alyn Road and behind Belgrave Road. Of the sixty-four houses the defendant still retains thirty-four—twenty-six of which so drain, the remaining thirty, including twenty-one so draining, have been sold to various purchasers. The defendant states that he has entered into no covenant with any purchaser relating to drainage.

Shortly after the defendant's purchase 'the pipe lines began to show signs that they were not functioning by reason of blockages'—I am again quoting from the evidence of the relators' Medical Officer of Health, and the system at a little later date proved itself to be inadequate for the work then being imposed upon it.

Thereupon the dispute arose which is the subject of this action, and once more I accept the evidence of the Medical Officer of Health and endorse his view that the respective contentions of the relators and the defendant account for the whole subsequent trouble. Although I am inclined to think that these contentions were fully appreciated on both sides many years before the writ was issued and that they are substantially the same contentions as have been put forward at the trial, it will perhaps be as well if I deal with the salient events of that intervening period.

By 1914 some portions of the pipe lines had become subject to serious blockages, and in 1917 or 1918 the attempts to keep the pumps working with any useful results had been finally abandoned, as also had all further building or development work on the estate.

In August, 1917, the defendant offered the property for sale by auction, first as a whole and afterwards in lots under particulars in which were contained statements with regard to the then existing drainage, the truth of which could not

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have been established; but as the auction proved entirely abortive, it is not necessary to follow the matter further, and I only mention it because it was not unnaturally made the subject of considerable cross-examination.

In the latter part of 1918 and on several subsequent occasions, owing to the overcharged condition of the pipe lines, sewage matter flooded the basements and curtilage of some of the houses. In September and October of that year notices under the Public Health Act requiring the abatement of this nuisance were served on the defendant, and a freeholder, Mr. Dingley, wrote a forcible letter to the Local Government Board directing attention to the state of affairs. This led to some correspondence, but to no satisfactory result, and in 1920, when the influx of visitors had largely increased the sewage to be dealt with, Mr. Dingley and the defendant himself wrote to the Ministry of Health, a step which was followed by the service on the defendant's agent of fresh notices to abate and a summons for default of compliance, and ultimately by the visit on November 12, 1920, of an inspector from the Ministry in the person of Mr. P. M. Crosthwaite. The result of his inquiry was communicated to the relators in a letter of February 10, 1921, in these terms: 'Sir, I am directed by the Minister of Health to state that the report made by Mr. Crosthwaite after his visit to Barmouth with reference to the sewage of Fairbourne has been under consideration. The question whether the sewers which have been provided on the estate are public sewers vesting in the Rural District Council has been submitted to the Minister's legal adviser, who is of opinion, on the information before him, that they are, and in view of this opinion and of the provisions of s. 19 of the Public Health Act, 1875, I am to request that the Rural District Council will further consider the matter and inform the Minister what steps they propose to take to deal with the present insanitary conditions of the place.' In their reply of March 22 the relators say that they are advised that 'these sewers come within exceptions 1 and 2 of s. 13 of the Public Health Act' and go on to suggest that

Fairbourne should be made a separate drainage district. Correspondence followed upon this suggestion, but it was ultimately disposed of by a letter of the Ministry of Health dated July 19, 1921, wherein it is stated that the Minister 'is unable to regard the case as one justifying the formation of a special drainage district.' In April, 1922, the relators again wrote to the Ministry of Health and received in reply this letter (dated April 13, 1922): 'Sir, I am directed by the Minister of Health to advert to your letter of the 4th inst. with reference to the condition of the drains and sewers at Fairbourne. The Department can only refer the Rural District Council to their letter of the 10th February, 1921, and state that in the circumstances, it would appear to be the duty of the District Council to perform the necessary work of cleansing the sewers in question, charging the cost upon the special expenses rate of the contributory place.'

Later in the year the Ministry, who in the meantime had been the recipient of further complaints, wrote again drawing attention to the letter I have just read, and after some intermediate correspondence, another inspector of the Ministry, Mr. F. O. Sandford, held a second local inquiry on January 2, 1923. Between that date and the issue of the writ on December 10, 1923, there took place a desultory correspondence unproductive of any practical results, and I pass it by.

By the writ an injunction is claimed to restrain the defendant from continuing the public nuisance caused by the accumulations of sewage in or upon the estate and in the land drains thereof and in the lines of pipes, manholes, and tanks respectively constructed therein and thereon in connection with the sewage system thereof.

The latter part of that claim raises the real question in dispute—the ownership of the lines of pipe, manholes, and tanks. The earlier part is explained by the allegations in the last few lines of paragraphs 6 and 7 respectively of the amended statement of claim. It is therein alleged that the defendant 'broke into the said lines of pipes at certain manholes and inserted overflow pipes which were connected

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to surface water channels in parts of the said estate,' and that 'when the said sewage escapes into the surface water channels a further nuisance is created.' And this is in fact the case. When in 1917 or 1918 the system had become inadequate and the pumps quite insufficient to cope with the accumulated sewage the inevitable result was that the domestic sewage could not get away through the house drains and gradually invaded the dwellings. It was this class of nuisance to which the notices to abate related, and the defendant, unable, consistently with his assertion that the pipe lines belonged to the relators, to interfere with what was not his property, did in fact comply or attempt to comply with the notices by inserting in his own land between some of the watercourses and some of the manholes and tanks, lines of pipe by means of which the overcharged manholes and pipes were relieved to the extent to which the sewage passed through such pipes into the channels. Evidence has been given that the defendant's acts in this behalf certainly mitigated the nuisance, and he pleads that if any nuisance does exist, it is due to the default of the relators in carrying out their duties in relation to the sewers. These connections were made before the end of 1920, and their existence was undoubtedly well known to the officers and servants of the relators. Indeed, according to the evidence of Mr. Arthur Peacock, the defendant's brother and agent, it was the sanitary inspector who on the occasion of Mr. Crosthwaite's inspection in November, 1920, begged him 'to do something without prejudice.' He adds that he then put in four of the outlets. No protest or complaint was ever made in reference thereto prior to the writ."

Gover K.C., *Scholefield K.C.* and *Cleveland-Stevens* for the plaintiff. There is clearly a public nuisance of a very serious nature arising from the accumulation of sewage on the defendant's land. It was entirely occasioned by his acts or defaults. The drainage system employed on the estate was in its inception a temporary system of glorified cesspools, and could not have vested in the local authority. It is true that

it worked without any serious complaint until 1917, when the windmill and electric motor used for pumping sewage from the tanks were dismantled and disused, and all pumping thereafter ceased.

Down to that date the nuisance was kept under some control by the mechanical contrivances, but there were various defects, and no effective outfall was provided to get rid of the solid matter of the sewage. That was the primary cause of the trouble. As houses increased no enlargement of the drainage system was ever submitted to the local authority, nor were these drain pipes or the system ever in fact taken over by that authority. The whole system was inefficient.

These lines of pipes leading into Lancashire boilers as settling tanks cannot be termed "sewers" within the meaning of s. 4 of the Public Health Act, 1875, unless there was an effective outfall and a discharge therefrom. They come within the exceptions to s. 13: *Attorney-General* v. *Tod Heatley* (1); *Meader* v. *West Cowes Local Board*. (2)

When the particulars of the attempted sale in 1917 were put forward by the defendant it was stated that the drainage was functioning, and an extension of it was contemplated.

The case which appears to be against our contention that these pipes were not sewers is *Hornsey Local Board* v. *Davis* (3), but that was an extreme case, and can be differentiated from the present on the facts. It was an illegal act, we submit, to turn the overflow pipes into open watercourses, thereby adding to the nuisance. A pipe in order to be a sewer must do something which effectually operates as a sewer, and no part of this system of drainage was a "sewer" within the Act.

[They also referred to *Packenham* v. *Ticehurst Rural Council* (4); *Waltham Holy Cross Urban Council* v. *Lee Conservancy Board* (5); *Button* v. *Tottenham Urban Council* (6);

(1) [1897] 1 Ch. 560.
(2) [1892] 3 Ch. 18.
(3) [1893] 1 Q. B. 756.
(4) (1903) 67 J. P. 448.
(5) (1910) 103 L. T. 192.
(6) (1898) 78 L. T. 470.

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Titterton v. *Kingsbury Collieries* (1); and *Attorney-General* v. *Guardians of Poor of Union of Dorking.* (2)]

Macmorran K.C. and *Sir M. D. Warmington* for the defendant. The lines of pipes were "sewers" within s. 4 of the Act, and vest in the sanitary authority under s. 13. Consequently they are under a statutory obligation, according to s. 19, to abate the nuisance which is admitted. The scheme of drainage by the defendant was known to the sanitary authority from the outset in 1902. The cases are, it is submitted, conclusive on the question of these pipes being "sewers" and not drains: *Travis* v. *Uttley* (3); *Beckenham Urban Council* v. *Wood* (4); *Turner* v. *Handsworth Urban Council* (5); *Pinnock* v. *Waterworth* (6); *Acton Local Board* v. *Batten* (7); *Ferrand* v. *Hallas Land and Building Co.* (8); *Vowles* v. *Colmen* (9); *Vare* v. *Joy* (10); *Reg.* v. *Tynemouth Rural Council* (11); *Fordom* v. *Parsons* (12); and *River Thames Conservators* v. *Port Sanitary Authority of the Port of London.* (13) Being therefore "sewers" they vested in the local authority, and once vested could not be divested.

Scholefield K.C. in reply referred to *Butt* v. *Snow* (14); *Hesketh* v. *Birmingham Corporation* (15); and, on the definition of "drain" and "sewer," to *Sutton* v. *Mayor and Aldermen of Norwich.* (16)

Cur. adv. vult.

Dec. 21. EVE J. The trial of this action involves the determination of a long standing dispute between the relators and the defendant concerning the responsibility for the efficient management of the system of drainage installed on the defendant's estate at Fairbourne in the county of Merioneth within the district of the relators. Each party insists that the other has neglected and ignored legal

(1) (1911) 104 L. T. 569.
(2) (1882) 20 Ch. D. 595.
(3) [1894] 1 Q. B. 233.
(4) (1896) 60 J. P. 490.
(5) [1909] 1 Ch. 381.
(6) (1887) 51 J. P. 248.
(7) (1884) 28 Ch. D. 283.
(8) [1893] 2 Q. B. 135.
(9) (1895) 64 L. J. (Ch.) 414.
(10) (1920) 85 J. P. 29.
(11) [1896] 2 Q. B. 219.
(12) [1894] 2 Q. B. 780.
(13) [1894] 1 Q. B. 647.
(14) (1903) 89 L. T. 302.
(15) [1924] 1 K. B. 260.
(16) (1858) 27 L. J. (Ch.) 739, 742.

obligations and is responsible for a condition of things on the estate which undoubtedly constitutes a danger to public health and a serious nuisance. [His Lordship stated the facts and evidence as above set out and continued:] There can, I think, be no doubt that prima facie these lines of pipes are sewers within the meaning of s. 4 of the Act, and it is obvious that down to a late stage in the dispute the relators so regarded them, their case, repeated more than once in their correspondence with the Ministry of Health, being that they were sewers included in the first or second exception in s. 13. At the trial nothing has been said in support of the case under the second exception, and although the first has been relied on, it was conceded that, so far as this Court is concerned, the point is concluded by authority against the relators.

In these circumstances, the point has been taken and strenuously argued that these lines of pipe are not sewers at all but merely elongated cesspits constituting the receptacle into which the sewage is conveyed, not the channel for carrying away feculent and polluted matter from houses and buildings. It has been contended that no line of pipes which does not terminate in an outfall is a sewer within the Act—indeed at one time I think the argument went to this length, that to constitute a sewer within the Act, the channel must carry the sewage to the outfall and there discharge it by gravitation.

No authority to support this latter contention has been produced, and I do not think it could be, for it is notorious that in the case of flat and low-lying lands, channels with an adequate gradient—1 in 20 was, I think, mentioned as adequate by one of the experts—must of necessity run to considerable depths before reaching the point of discharge, and that, when they do reach that point, their contents have not infrequently to be raised to the surface for ultimate disposal by an elaborate installation of pumps.

On the other hand, there is authority in *Meader* v. *West Cowes Local Board* (1) for the proposition that a line of pipes

(1) [1892] 3 Ch. 18.

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which is not a drain, is nevertheless not a sewer within the meaning of the Act if it does not fulfil the functions of a sewer in carrying sewage away.

Can these pipe lines be brought within that authority? In order to answer that question, one must have regard to the beginning of this century, and ask oneself whether at the dates prior to or in the year 1902, when they must have vested in the local authority, if indeed they were sewers, these lines of pipes were mere receptacles for sewage, or whether they were so laid, constructed, and equipped as not only to receive the sewage discharged into them but to carry it along to points where it was disposed of—the liquids by one sort of pumping and the solids by another kind of pump.

I think the answer to that question is to be found in the evidence of the Medical Officer of Health and other witnesses on both sides, that for ten years and upwards—in the original statement of claim it was alleged that no nuisance was caused down to 1917—these lines of pipes, or "sewers," as I think I may now designate them, satisfactorily fulfilled their purpose. That they are now worn out and inadequate has no relevancy.

The conclusion, therefore, at which I have arrived is that these sewers, laid with the full knowledge and approval of the relators, vested in them at dates all prior to the end of 1902; that the discontinuance of the pumping in 1917 or 1918 by the defendant did not cause or aggravate the nuisance, as by that time the pipes were for all practical purposes blocked up; that the insertion of the overflow pipes was assented to if not proposed by the relators, and mitigated the nuisance; and that the unsatisfactory state of things on this estate and any nuisance arising therefrom is solely attributable to the persistent disregard by the relators of the statutory duties imposed on them by the Act.

I, therefore, dismiss the action with costs.

Solicitors: *Rhys Roberts & Co., for Guthrie Jones & Jones, Dolgelly; Whites & Co., for J. Charles Hughes & Co., Dolgelly.*

G. M.

In re APPLICATION OF BRAMPTON BROTHERS, LIMITED.

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Oct. 27, 28;
Dec. 4, 8.

[1925. B. 081.]

Patent—Compiroller—Refusal to register Designs on Ground of having previously refused to register similar Designs—Not good Ground for Refusal—Costs of Comptroller—Patents and Designs Act, 1907 (7 *Edw.* 7, *c.* 29), *s.* 56; *s.* 69, *sub-s.* 2.

The Assistant Comptroller refused to register a design on the ground that the office had already refused registration to an earlier applicant for practically an identical design, and that it would be a hardship on the previous applicant to register the design, the subject of the present application:—

Held, that, there having been no publication of the previous application, the fact that it had been refused by the Comptroller's office was not a good ground for refusing the present application.

Held, further, that, as the previous applicant had not appealed against the decision of the Comptroller's office, it would be no hardship on him to grant the present application.

The principles on which the Court should act in determining whether on a successful appeal from the Comptroller's decision the applicants should pay his costs considered.

On March 31, 1925, the applicants applied for registration of two designs in class 1 relating to tandem bicycles, and numbered 712,110 and 712,111. The Assistant Comptroller refused to register the designs, and gave his reasons for so doing in writing. One of his reasons for refusing to register was that the office had already refused registration to a previous applicant for practically the identical design, and he stated that "It would seem clear that the previous applicant for registration must, in the absence of any evidence to the contrary, be regarded as the proprietor of the design, and should be allowed registration in view of the fact that his application was filed some months before the present application." The previous applicant did not appeal against the decision of the Comptroller's office. The applicants now submitted that the Assistant Comptroller was wrong in refusing the registration of their designs, and they prayed that his decision might be reviewed, and that the Court

TOMLIN J. might order that the Comptroller General should be directed to proceed with the registration of their designs.

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Trevor Watson for the applicants. The office has assumed jurisdiction to refuse registration of these designs on the ground of want of novelty by looking at a document which we say they are not entitled to look at for that purpose—namely, a similar design in a lapsed application for registration. That is a secret document, and cannot be looked at for any purpose whatever. In *Dollond's* case (1), referred to in Webster's Reports on Patents, vol. i., p. 43, an objection was raised to Dollond's application on the ground that a Dr. Hall had made the same discovery before him, and it was held that, as Dr. Hall had confined his invention to his closet, and the public were not acquainted with it, Dollond was to be considered as the inventor. That principle was upheld in *Hills* v. *London Gas Light Co.* (2) By the provisions of s. 69, sub-s. 2, of the Patents Act, 1907, it was evidently intended that an application abandoned or refused should be kept secret. This application ought to be granted, and these designs registered.

Dighton Pollock for the Comptroller General. It has been the practice of the Comptroller's office to refuse applications for designs which are similar to designs the subject matter of previous applications that have been refused, on the ground that it would be unfair to the previous applicants to register the subsequent applications.

TOMLIN J. At the conclusion of his reasoning, the Assistant Comptroller called attention to the fact that the design which was sought to be registered was, in his view, similar to a design in respect of which an application had previously been made to him and refused by him, a refusal which the applicant on that occasion had acquiesced in, not seeing fit, for reasons good or bad, to appeal to the Court. The Assistant Comptroller has thought it his duty to take into account that design in considering whether or not he could allow this

(1) Not reported. (2) (1860) 5 H. & N. 312, 336–7.

application, and the point has been raised that in fact that is a matter which he has not any right to take into account at all, and I am asked to decide, and I think it is necessary for me to decide, whether or not his view is right.

It seems to me to be plain that if his view is right, it would be my duty here and now to look at that particular design which was refused, and, if necessary, after an examination of that design to modify the conclusion which I have arrived at before taking that into account. I have satisfied myself that the view which the Assistant Comptroller takes on this matter is not correct, and that neither he nor I is justified in having regard to an application which has been refused, and I have, therefore, abstained from looking at that particular design, and know nothing as to its contents.

The grounds upon which I base myself in arriving at that conclusion are these: in the first place the test to be applied is the test of novelty. Novelty is to be determined by reference to publication. There is no publication in regard to a design which has been submitted to the Comptroller for registration, and has been rejected by him. There is no difference between that design and the design which any draftsman may have in his writing-table drawer and has not disclosed to any other person. In this connection it is to be observed that s. 69, sub-s. 2, of the Patents Act, 1907, provides: "Where an application for a design has been abandoned or refused the application and any drawings, photographs, tracings, representations, or specimens left in connexion with the application shall not at any time be open to public inspection or be published by the comptroller." Again, in s. 56, which deals with the inspection of registered designs, and limits their inspection by the public for a certain number of years, there is this proviso: "Provided that where registration of a design is refused on the ground of identity with a design already registered, the applicant for registration shall be entitled to inspect the design so registered." It is to be observed that that proviso recognizes the principle that if a particular document or design affords a ground of objection to his application, the applicant, on general principles of justice,

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is entitled to know what it is; that is the first thing it indicates, and the second thing it indicates is that inasmuch as it deals only with the case of a refusal by reason of identity with a design already registered, and does not deal with the case of refusal on the ground of identity with a design refused, it is not an unfair inference that the identity with a design refused is not a ground which the Comptroller can take in considering an application for registration, more especially as, under s. 69, sub-s. 2, if he did make it a ground of objection he could not, except in breach of his statutory duty, disclose it to the applicant; with the result that on the one hand the Comptroller would be free to reject the application on the ground of the identity with the subject matter of the previously rejected application, and at the same time the applicant would be put in this position, that he has no means of knowing, and the Comptroller is under the statutory duty of not disclosing to him, the thing on the basis of which his application is refused. That is a condition of affairs alike inconsistent with the language of the statute and inconsistent with the ordinary principles of justice; and I come to the conclusion that a design, the subject matter of a refused application, is not a thing which is entitled to be regarded at all as such in relation to any subsequent application for a design, even though, when compared, the two designs might be identical.

It is urged that the result is a hardship upon the first applicant whose application was refused. It seems to me that that is not a good ground of objection. The first applicant had his remedy; he was free, if he was dissatisfied with the decision of the Comptroller, to come to the Court to have it corrected. If he has not seen fit to do so, he cannot afterwards complain that one, who has independently designed something which is identical with his own original idea, is able, by more active diligence, to acquire the rights which he himself has failed to obtain.

I, therefore, direct the registration in this case of both these designs.

P. J. B.

Dec. 4. The question whether the applicants ought to pay the costs of the Comptroller was argued.

Trevor Watson for the applicants. The Comptroller ought to pay his own costs of this successful appeal against an order refusing registration of the applicants' designs. There is no direct authority in the case of an appeal under s. 49 of the Patents and Designs Act, 1907. There have only been two previous appeals under the section. In the first of these the appeal was successful, and the Court decided that the Comptroller ought to pay his own costs, but it was expressly stated that this was not to create a precedent. In the second case, *In re Drury's Application* (1), the applicant had made too wide a claim, and although registration was allowed, subject to a disclaimer, he was ordered to pay the Comptroller's costs.

It is necessary therefore to see what is done in the case of patents and trade marks. No analogy can be obtained from the practice in regard to patent proceedings, because cases which come before the Court on appeal from the Comptroller are inter partes and the Comptroller does not appear. Appeals from the Comptroller go in other cases to the law officers.

In the Trade Marks Act, 1905, s. 48, there is an express provision that the costs of the Registrar on appeals from his decision are to be in the discretion of the Court. The practice is to order the appellant, even if successful, to pay the costs of the Registrar, unless the unsuccessful Registrar appeals to the Court of Appeal. If he fails there, he pays his own costs. Even on an appeal to the Court of Appeal by an unsuccessful applicant, he will not be ordered to pay the Registrar's costs where it is a test case to decide some important point of principle: *In re Van Duzer's Trade Mark* (2); *In re Farbenfabriken Vormals Fried Bayer & Co.'s Application.* (3)

In the present case no point of general importance as

(1) Unreported. (2) (1887) 4 R. P. C. 31, 40.
(3) (1893) 11 R. P. C. 84, 93.

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matter of principle is involved. The question whether the Comptroller could have regard to a design that had been refused as constituting an anticipation was involved in *In re Drury's Application.* (1) This appeal has been forced on the applicants because the Assistant Comptroller paid no heed to what was said in that case, or because he desired to have a definite decision on the point. The Comptroller ought therefore to pay his own costs.

Dighton Pollock for the Comptroller. It is not correct to say that this case was brought forward to have this point decided. It is admitted that the Court has a discretion either to give the Comptroller his costs or to leave him to bear his own costs: Order LIII.A, r. 7. But the Court should be guided in the exercise of its discretion by the practice in regard to trade mark cases. In trade mark cases, the Registrar is usually given his costs unless he is thought to have acted unreasonably: *In re Birmingham Small Arms Co.'s Application* (2); *In re Actien Gesellschaft Apollinaris Brunnen's Application* (3); *In re National Starch Co.'s Application.* (4)

On further appeals to the Court of Appeal or House of Lords the matter has been dealt with on a rather different footing, and the Registrar has been left to pay his own costs, if an important point of practice was involved.

The Comptroller is a public official, and has to give decisions in the course of his duty on difficult questions. His duty is to protect the public. On an appeal he is brought to the Courts to defend his decision. On general principle, therefore, he ought to get his costs provided for unless he has been guilty of something amounting almost to misconduct. There is nothing about this case to cause the Court to depart from the ordinary rule. An attack has been made on him on the ground that he decided the case on a point already discussed in *In re Drury's Application.* (1) But that was only one ground of his decision, and after arriving at his decision on other grounds, he referred to

(1) Unreported.
(2) (1907) 24 R. P. C. 563, 568.
(3) (1907) 24 R. P. C. 436, 440.
(4) (1908) 25 R. P. C. 802, 807.

the prior refused design as yet an additional ground for his decision.

Trevor Watson in reply. The whole question is whether it is reasonable in the special circumstances of this case that the applicants should be made to pay the Comptroller's costs. If the only ground of the Comptroller's decision had been that there had been an anticipation by the previous refused design, there would be a clear case for making the Comptroller bear his own costs, seeing that in *In re Drury's Application* (1) counsel for the Comptroller abandoned the contention that the Comptroller could have regard to a refused design. That is really the substantial position. The question as to whether the Comptroller was entitled to have regard to this secret document was the main matter of argument at the hearing before him; and although in stating his reasons in writing he has brought in other grounds for his decision, they were really an afterthought.

[TOMLIN J. I must accept the written judgment as expressing the grounds of the Comptroller's decision.]

Even so, the applicants ought not to be made to bear the Comptroller's costs. The Comptroller, in giving regard to the secret document, acted contrary to the view taken by the Court in *In re Drury's Application.* (1)

TOMLIN J. The question which I have to decide is whether the applicants on an appeal from a decision of the Comptroller refusing to register a design under the Act ought to pay the costs of the Comptroller in respect of the application, the applicants having succeeded, with the result that the design goes on the register.

In the Act itself there is no express provision in regard to the costs of an application on an appeal from a decision of the Comptroller, but Order LIII.A, r. 7, provides that: "In all proceedings before the Court under the principal Act, the costs of and incident thereto, and also the costs of hearings before the Comptroller, shall be in the discretion of the Court," with an exception which is

(1) Unreported.

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not material. The costs in these applications are prima facie in the discretion of the Court.

It is said that the practice may well follow the practice in regard to trade marks, and that there is a definite well recognized practice in regard to them. In the Trade Marks Act, 1905, s. 48, it is provided that "In all proceedings before the Court under this Act the costs of the Registrar shall be in the discretion of the Court, but the Registrar shall not be ordered to pay the costs of any other of the parties." When regard is had to that section as to applications under the Trade Marks Act and the rule which I have read as to applications under the Patent Act, the position seems to be identical to the extent that the costs of the Registrar or Comptroller are in the discretion of the Court.

My attention has been called to a number of cases in which the costs of the Registrar in relation to trade marks have been dealt with; and I think it is a fair summary of those cases to say that the practice has always been to treat him not as an ordinary litigant but as an official occupying something in the nature of a fiduciary position who is to have his costs, unless by reason of special circumstances he ought to be deprived of them. Kekewich J. said in *In re Birmingham Small Arms Co.'s Application* (1): "It seems to me that, although the Registrar is not a trustee, he is a public official, and he is to be regarded in quite a different manner from any person other than a trustee. He is a person, so to speak, occupying a fiduciary position. The general rule of the Court with regard to persons in that position is, that they are entitled to their costs so long as they do nothing to disentitle them to costs, and I think I ought to adopt that rule generally. In cases raising some question of that kind, though I could not make the Registrar pay the costs, I certainly should not give him any." In that passage the expression "In cases raising some question of that kind" means, I think, in cases where the Registrar has done something to disentitle him to costs. It is not plain from the language of Kekewich J. what in his view were the

(1) 24 R. P. C. 563, 568.

circumstances in which the Registrar would disentitle himself to costs; but it is quite plain, having regard to the facts of that case, that a mere error in law was not treated as something which disentitled the Registrar to his costs. If it were otherwise and error were a ground for depriving the Registrar of his costs, the applicant would be entitled to escape paying those costs in every case in which the decision of the Registrar was reversed.

I do not propose to define the cases in which the Comptroller will be deprived of his costs; I propose to content myself with a more modest programme by determining whether or not in this particular case he is to get his costs.

In this particular case I have the written judgment of the Comptroller, and I must take it that this represents, and fairly represents, the conclusion at which he had arrived. In that judgment he says: "In my opinion, the cycle frame of the present application, like that of the other application, is a mere combination of well known trade variants, none of which has any novelty, and since this combination does not result in any substantial new shape I have refused the application under the discretionary power conferred by s. 49, sub-s. 3, of the Act, because I cannot regard what was submitted for registration as having such features of substantial novelty as to constitute a new or original design within the meaning of the statutes." Then he goes on: "My remarks concerning the identity of the design of the application numbered 712,110 of 1919 with that of an earlier application apply with equal force to the present application. If I am wrong in regarding the present design as possessing no substantial novelty, it is clear that the application of the earlier applicant to register what is practically the same design ought not to be refused. The presence on the register of this earlier design would, of course, operate fatally against the present application."

It is said by Mr. Trevor Watson, first, that there was some matter on which the Comptroller relied which had not been discussed at the actual hearing before him. The only material relating to that is some correspondence; and I think it

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would be impossible for me to deal with this case upon the basis of anything of that kind without giving the Comptroller an opportunity of presenting his view of the facts. I do not see how I can take that into account.

The other matter on which Mr. Trevor Watson relies is that the Comptroller decided the case by reference to a secret document—namely, a previous application for a design which had been refused, and that the Comptroller regarded himself as at liberty to look at that design and to say by reference to it that the application before him was not novel. There is no doubt that the Comptroller looked at the previous design and there is no doubt now, having regard to my judgment on the merits of this case, that he was not entitled to do so. But Mr. Trevor Watson says that the Comptroller ought to have known this before, because in a previous case, *In re Drury's Application* (1), there was a similar point raised; and that when, in the course of the argument, attention was called to the matter, counsel for the Comptroller, after some observation by me, said he would not press the matter any further; and the point was dropped that the Comptroller was entitled to look at a refused design. That case was not reported; but I think I am right in saying that in my judgment on that occasion I made no reference to the matter at all; and I do not know whether the Comptroller was aware of what had occurred in Court in respect of that application. I have no reason to suppose, and there is no evidence to show, that he was aware of the matter being raised; and it certainly was not determined. I had made some criticism upon the view that the Comptroller was entitled to take into account a refused application, and counsel for the Comptroller then saw fit not to rely on that ground for refusing the later application. Whether he gave that up because he did not like it or as a matter of policy I do not know. At any rate there was no decision on the point. I can hardly regard the Comptroller, in the light of those facts, as having deliberately disregarded the view of the Court. I think I must regard him as having come to a

(1) Unreported.

conclusion on the point of law, unconscious that there was any light to guide him.

The point has now been decided, but Mr. Trevor Watson says that this valuable decision ought not to be obtained at his expense. But I think he goes too far when he suggests that this case has centred round this particular point. It seems to me that the Comptroller's judgment shows that he decided the case quite irrespective of that point, and that he only utilized that point as an additional ground for his decision, saying in effect: "If I am wrong on the first point, then this further point arises."

In these circumstances, is there anything which justifies me in saying that the Comptroller ought to have no costs? My own view is that it is very desirable that there should be reasonable uniformity in the practice in regard to trade marks and designs. There is no actual difference in the practice in the two cases, except that in regard to trade marks I am not the final Court of Appeal whereas, for some reason I have never yet appreciated, I am the final Court of Appeal in regard to designs. Whether that is a distinction which ought to introduce any difference in relation to costs may be doubted, although I think it conceivable that a case may be more readily treated as a test case in regard to designs when before me who am the final Court of Appeal, than in regard to trade marks when the question whether a case is a test case will not arise until it is before the Court of Appeal. However that may be, I do not think there is enough in this case to justify me in treating it as of the nature of a test case. A point of some interest has been determined, but it is plain to my mind that, if the point had never been raised, the applicants would equally have been compelled to come here. It seems to me that the presence in the case of that particular point is no reason for relieving the applicants of that burden which, but for this point, they would certainly have had to bear.

I therefore come to the conclusion that the costs of the Comptroller should be borne by the applicants; but in those costs I do not propose to include costs by reason of the

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separate discussion in regard to costs, which in itself may be considered, perhaps, as of the nature of a test case. I base my decision on the desirability of securing uniformity in the practice in regard to trade marks and designs.

Solicitor for the applicants: *G. Beloe Ellis.*

Solicitor for the Comptroller General: *Solicitor to Board of Trade.* H. C. G.

EVE J. 1925 *Nov.* 23, 24; *Dec.* 10.

PUBLIC TRUSTEE *v.* ELDER.

[1924. P. 1390.]

Partnership—Account—Parties—Enemy Firm with English Partner—Liquidation—Assignment—Custodian—Emergency Legislation—Trading with the Enemy (Amendment) Acts—Treaty of Peace Order, 1919, *art.* 297—*Partnership Act*, 1890 (53 *&* 54 *Vict. c.* 39), *ss.* 31, *sub-s.* 2; 38.

At the outbreak of war on August 4, 1914, three German subjects were carrying on, in co-partnership with F., their English partner, the business of merchants in London under the style of Arnold Otto Meyer & Co. Under the partnership articles F. was the managing partner in London, and on the dissolution by the declaration of war he carried on the business and collected the assets with the view of liquidation. No accounts had been taken between the partners since December 31, 1913. F. died in 1920, and the defendant was his legal personal representative. By an Order of the Board of Trade dated April 1, 1924, it was ordered that all the property, rights, and interests of the three German partners in the assets of the firm in respect of any claim against the English partner, or his estate, should vest in the plaintiff, who should take all necessary proceedings to collect what might be due to the German partners. In an action by the plaintiff as custodian of enemy property with the object of winding up the partnership he claimed an account against the defendant of all dealings between the German partners and the English partner, including all dealings with the partnership assets since the dissolution, payment of what should be found due, and an inquiry of what the partnership property consisted. The German partners were not added as plaintiffs in the action:—

Held, that in the absence of the German partners as parties to the action no such relief as was asked could be granted, and the action failed.

ACTION WITH WITNESSES.

The plaintiff was the custodian for England and Wales under the Trading with the Enemy (Amendment) Act, 1914, and sued in that capacity.

The defendant, Robert William Elder, was the legal personal representative of Augustus George Faber, who died on October 2, 1920.

At the outbreak of war on August 4, 1914, and for some time previously three German subjects resident in Hamburg were carrying on business as co-partners with Augustus George Faber, their English partner, in the City of London under the style of Arnold Otto Meyer & Co. The partnership was constituted by articles dated August 21, 1911, and was dissolved by the declaration of war with Germany. The facts are taken from the judgment of the Court.

"The business of the firm, that of merchants and agents, was carried on in London under the management of Mr. Faber, and the profits were equally divisible amongst the four partners. In addition to his share of the profits of the London business, Mr. Faber was entitled to a share of a percentage received by his co-partners as management commission from a private company located in Singapore, and he was authorized to draw on account of his share of current profits sums not exceeding 1000*l.* annually. At the date of the dissolution the assets and liabilities of the firm were very considerable, and Mr. Faber had already drawn sums amounting to 893*l.* 12*s.* 6*d.* on account of his share of the profit for 1914. On the dissolution the assets had to be collected and the affairs of the partnership liquidated; for these purposes each partner was the agent of the others, and the authority of each to bind the firm and the other rights and obligations of the partners continued notwithstanding the dissolution so far as necessary to wind up the affairs of the partnership and to complete current transactions. (See s. 38 of the Partnership Act, 1890.) During the war the German partners were subject to such disabilities as attached to them as alien enemies. The liquidation has proceeded both in this country and in Germany, but no account has been taken between the partners since December 31, 1913, and the object of this action is to secure the final winding up of the partnership affairs.

The action is the sequel to a former action instituted on

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May 3, 1920, against Mr. Faber in his lifetime and carried on after his death against the present defendant, wherein the Controller appointed under the Trading with the Enemy Amendment Act, 1918, to conduct the realization and distribution of the assets of the said business, suing in the name of the firm and as Controller, sought to recover from Mr. Faber and his estate sums amounting to between 4000*l.* and 5000*l.*, alleged to be assets of the business in the defendant's hands and which included the 893*l.* 12*s.* 6*d.* drawn by Faber on account of profits for 1914. That action was finally disposed of in May, 1923, when the Court of Appeal held that it was not maintainable and ordered it to stand dismissed with costs: *Meyer & Co.* v. *Faber.* (1) The connection between that action and this one is of historical interest only. Its fate in no way affects the result of the present proceedings.

The title of the plaintiff in this action is based on an order of the Board of Trade dated April 1, 1924, whereby it was ordered that all the property, rights, and interests of the three German partners and each of them as former partners and partner in the said firm, of whatever description, in the assets of the said firm, or the proceeds thereof, or in respect of any claim against the English partner, or his estate, or against any other person, should vest in the plaintiff, and that he should take all such legal or other proceedings as might be necessary to get in and collect whatever moneys might be due in respect of such property, rights, and interests of the German nationals as aforesaid. In his statement of claim the plaintiff alleges that the whole of the assets of the business were in Faber's possession, or under his control, in November, 1918—an allegation in support of which no evidence was given—that no proper account had been given to him of the English partner's dealing with the assets of the partnership, and that on the taking of a proper account a considerable sum would be found to be owing from Faber's estate to the German partners, and he claims what is in form and substance the ordinary judgment in an action

(1) [1921] 2 Ch. 226; [1923] 2 Ch. 421.

between partners to wind up the affairs of a dissolved partnership; that is to say:—

(*a*) An account of all dealings and transactions between the German partners and the English partner as co-partners, including in such account all dealings with the partnership assets since the dissolution;

(*b*) Payment by the defendant to the plaintiff of what on the taking of the said account shall be found to have been or be owing from the English partner or his estate to the German partners or the plaintiff;

(*c*) An inquiry of what the credits, property, and effects now belonging to the partnership consist; and

(*d*) Such further accounts, inquiries, and other relief as may be necessary for winding up the affairs of the partnership and adjusting the rights of the plaintiff and the defendant in relation thereto."

Gover K.C. and *Vaisey K.C.* for the plaintiff. The plaintiff and the defendant are now the only persons interested in the assets of this partnership. The previous action of *Meyer & Co.* v. *Faber* (1) was an action by the Controller in the name of the firm and as Controller to recover an alleged debt from Mr. Faber and his estate, and reliance was placed on art. 296 of the Treaty of Peace Order, 1919. It cannot be said in the present action that the plaintiff, who is the absolute assignee of the German partners in the partnership assets, has no means of obtaining from the defendant, as the personal representative of Mr. Faber, such sums as he may have to account for to the partnership. Lord Sterndale M.R., in *Meyer & Co.* v. *Faber* (2), clearly contemplated that there was a remedy in such a case, and said: "The enemy partner's interests, as it seems to me, could be vested in a custodian, and the custodian could then have accounts of the partnership taken, and the defendant made to pay what is properly due from him on the taking of the accounts." That is the form of the present action, and it is based on the vesting order of April 1, 1924, under which

(1) [1921] 2 Ch. 226; [1923] 2 Ch. 421. (2) [1923] 2 Ch. 436.

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the plaintiff is assignee of the beneficial interests of the German partners.

The partnership having been dissolved in 1914, there was an absolute assignment of their interests as from that date to the plaintiff, and there was nothing left in the German partners. Sect. 31, sub-s. 2, of the Partnership Act, 1890, applies. It cannot be said that the assignee is powerless to obtain his rights unless his assignor is joined as a party. The assignment was of all that remained of the partnership funds, not merely of a share. The action is also not a personal action, but an action in rem.

[They referred to *New York Life Insurance Co.* v. *Public Trustee* (1); *Bonnin* v. *Neame* (2); and art. 397 (*d*) of the Treaty of Peace Order, 1919, and the Schedule thereto.]

Wilfrid Greene K.C. and *Heckscher* for the defendant. The action is misconceived. The German partners should have been made parties, and they are not before the Court. It is fundamental that the assignor of an equitable chose in action should be a party. The right of a partner against his co-partners must be on the terms of submitting on his part to pay any balance found to be due from him. The plaintiff here has not so submitted. It is a question of the ordinary assignee of a share in a partnership. If the assignee wants liquidation he must sue his co-partners, and then submit to account. The assignee takes subject to all equities. If an account were directed under s. 31, sub-s. 2, of the Partnership Act, 1890, the German partners in their absence would not be bound by it.

[They referred to Lindley on Partnership, 9th ed., pp. 564, 627; Seton on Judgments, p. 2097; *Watts* v. *Driscoll* (3); *In re Bank für Handel und Industrie* (4); *Tolhurst* v. *Associated Portland Cement Manufacturers* (1900), *Ld.* (5)]

The Peace Treaty Order, 1919, does not apply to such rights as existed in the present case. There is no direct

(1) [1924] 2 Ch. 101.
(2) [1910] 1 Ch. 732.
(3) [1901] 1 Ch. 294.
(4) [1915] 1 Ch. 848.
(5) [1902] 2 K. B. 660.

authority upon the true rights of the partners in an action constituted like the present.

Gover K.C. in reply referred to *Hugh Stevenson & Sons, Ld.* v. *Aktiengesellschaft für Cartonnagen-Industrie* (1), and claimed as an alternative an account under s. 31, sub-s. 2, of the Partnership Act, 1890, as from the date of dissolution, so that the shares of the partners could be ascertained. There is no real answer on the merits to this action for account.

Cur. adv. vult.

Dec. 16. EVE J. [after stating the facts continued:] The defendant by his defence does not admit the plaintiff's allegations, asserts his right to bring into account various cross-claims, and among other defences submits that no such relief or accounts as are claimed by the plaintiff can be ordered or taken in an action to which the German partners are not parties. If this submission be well founded, there is an end of the matter, as the plaintiff deliberately elected not to make any application for an adjournment to enable him to add them as parties.

The plaintiff puts his case in this way. He says, and says truly, that in the circumstances he and the defendant are the only persons interested in the assets of the partnership. I need not elaborate this contention, as it is conceded that under the Peace Treaty and the consequential legislation and orders the German partners have no continuing beneficial interest in the assets. The plaintiff, it is recognized, is in the position of an absolute assignee of their shares in the whole of the partnership assets. But it was sought to be established on his behalf that the effect of the vesting order was to put him in some position superior to that of a mere assignee of the German shares and interests, and to vest in him a right to demand and obtain payment of any partnership moneys in the defendant's hands, leaving to the defendant the settlement of accounts between him and his former partners and the recovery from the latter of any sums which

(1) [1918] A. C. 239.

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the accounts might ultimately disclose as due from them to Faber's estate. I understood the argument to go to the whole of the moneys in the defendant's hands and not to be limited to the proportionate shares of the three German partners, but in the view I take of the plaintiff's true rights, the point whether he asserts a right to demand payment of the whole fund or only of three-fourth parts thereof is immaterial. For I cannot accede to the contention put forward on his behalf that his position is distinguishable from that of any other assignee. It is inconsistent with the relief claimed in the action; it is not supported by the vesting order itself, which in terms only purports to vest in the plaintiff the interests of the Germans as partners; it ignores the fact that the moneys sought to be recovered from the defendant are not confined to proceeds of realization, but include a substantial sum for alleged overdrawn profits—a matter of account which cannot be disposed of in the absence of the other partners—and it treats as an irrelevant defence to an action brought to recover moneys alleged to be due to the Germans as partners, and to adjust the rights of the plaintiff and defendant, the defendant's allegation that the Germans are accountable to the late English partner to an equivalent or even greater amount.

The plaintiff, in my opinion, is in no better position than any other assignee of the interests of the Germans, and his claim to be treated as a creditor of the defendant's testator is a misconception. I conceive the following to be a correct summary of the legal relations of partners in a dissolved partnership. Where assets are collected and got in, no partner has any definite share or interest therein, his right is merely to have the assets so collected applied in discharging the liabilities of the partnership firm and to receive his share of any surplus there may be when the liquidation has been completed; and further, there can be no relationship of debtor and creditor between partners unless and until the accounts have been finally taken and a balance has been ascertained to be due from each one to the others. Nor is any partner entitled to an account from his co-partners

except upon the footing that, in accordance with the implied obligation arising under the contract of partnership, he will himself account and submit to be charged with any balance found to be due from him.

Such being the legal position of the parties, the defendant, subject to the determination of certain other defences with which I do not propose to deal, would not resist—indeed, having regard to the fact that his interest in the whole matter is that of a trustee only, would welcome an order for the usual partnership decree on the terms that the plaintiff is willing to submit to be charged with all sums properly chargeable against his assignors, or, alternatively, to amend the record by adding the German partners as co-plaintiffs. But the plaintiff declines to accept either alternative, and insists on his right to have the accounts taken in circumstances calculated to inflict grievous injustice upon the defendant. I do not think he has any such right, and therefore I cannot give him the relief claimed in the action. At the trial the plaintiff asked, as an alternative, for an account under sub-s. 2 of s. 31 of the Partnership Act. I am not prepared to hold that in no case, and more particularly in a case where some of the partners are out of the jurisdiction, can the Court make an order for such account in the absence of the assigning partner or partners, but where, as here, the account cannot be taken without taking some account of the partnership dealings and transactions prior to the dissolution, I think the Court would be slow to make the order until all the accounting partners were parties. The defendant naturally objects to such an account being taken in proceedings in no way binding on his late partners, and I do not see what useful result could follow my making this alternative order, unless again the plaintiff is prepared to account for assets realized since dissolution and retained by his assignors. This he is not willing to do, and I think his action fails and must be dismissed with costs.

Solicitors: *Walker, Martineau & Co.; Roney & Co.*

G. M.

ASTBURY AND LAWRENCE JJ.

1926 Jan. 27.

In re A. AND M. (DEBTORS).

[48 of 1925.]

Bankruptcy — Infants — Traders — Own Petition — Receiving Order — Adjudication—Invalidity—Application of Official Receiver—Rescission and Annulment—Costs.

In the absence of debts actually enforceable against them infants cannot be made bankrupt, even on their own petition.

Ex parte Kibble (1875) L. R. 10 Ch. 373; *Ex parte Jones* (1881) 18 Ch. D. 109 and *Lovell* v. *Beauchamp* [1894] A. C. 607 applied.

Whether if a receiving order and order of adjudication are made in such a case the Official Receiver can deduct his costs of obtaining the rescission and annulment of those orders out of the assets, *quaere*.

APPEAL from Kingston-upon-Hull County Court.

On March 6, 1925, A. and M. commenced business in partnership as fish merchants under the style of "A. & M.," with a capital of 60*l*. On July 29 they filed their own bankruptcy petition in the county court, and a receiving order and order of adjudication were made by the registrar on that day. The assets, estimated at 33*l*., realized 28*l*. The liabilities, all incurred to twenty-eight trade creditors, were 194*l*.

At the preliminary examination on July 30 it transpired that A. and M. were both infants, aged nineteen and eighteen respectively.

On September 28, there being no suggestion that any of their liabilities were incurred for necessaries, or that there were any other enforceable debts, the Official Receiver applied to the county court to fix a day for hearing an application for rescission and annulment of the registrar's orders on the ground of infancy. The registrar appointed November 10 for hearing the application, and on November 3 he appointed a guardian ad litem for the infants.

On November 10 the registrar, after hearing the Official Receiver and the infants' solicitor, refused the application without costs.

On November 30 the Official Receiver gave notice of appeal, and asked that the respondents A. and M. should pay the costs of the appeal and in the Court below. The grounds

of the appeal were: (1.) The infancy of the respondents; (2.) That the orders ought not to have been made; (3.) Want of jurisdiction; (4.) That the petition was an abuse of the process of the Court; (5.) That the registrar was wrong in law.

Hansell for the Official Receiver. In the absence of debts actually enforceable against them the infants could not be made bankrupt, even on their own petition: *Ex parte Kibble* (1); *Ex parte Jones* (2); *Lovell* v. *Beauchamp.* (3)

Judging from his notes the registrar apparently relied on *In re Smedley* (4); *In re Hands* (5); and *In re Purser.* (6) But these were all cases before the Infants Relief Act, 1874 (37 & 38 Vict. c. 62). The registrar was wrong in law, and his orders should be rescinded and annulled.

The respondents were not represented on this appeal.

ASTBURY J. This is an appeal by the Official Receiver against a refusal by the registrar to annul an adjudication in bankruptcy made against two infant traders, aged nineteen and eighteen, on their own petition. There is no question as to any necessaries having been supplied to them, or that there were any other enforceable debts. The registrar on the Official Receiver's application declined to annul the adjudication, and the present appeal is brought against that refusal.

In our opinion the authorities are clear that, in such a case as this, infants cannot be adjudicated bankrupt, there being no legal debt. The registrar was wrong, and the appeal must be allowed.

LAWRENCE J. I agree. The order will be that the receiving order be rescinded and that the adjudication order be annulled.

Hansell. May the Official Receiver retain the assets against the costs?

(1) L. R. 10 Ch. 373, 377.
(2) 18 Ch. D. 109, 116, 119, 121.
(3) [1894] A. C. 607, 611, 613, 614.
(4) (1864) 10 L. T. 432.
(5) (1867) 15 W. R. 1089.
(6) (1868) 19 L. T. 23.

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[LAWRENCE J. I do not think we can make that order.]

Hansell. The receiving order and adjudication order were made on the infants' own petition and, while they stood, the Official Receiver was bound to collect and hold the assets. Surely he ought to be allowed to set off his costs before handing them back.

[ASTBURY J. The assets represent goods supplied to infant traders who are not liable to pay for them. It is not a case of making them indirectly responsible. They have voluntarily put their assets into the possession of the Court. I should have thought that the Court might have allowed the Official Receiver to apply them towards the costs.

LAWRENCE J. The assets are the infants' property for which they are not liable to pay.]

Hansell. That is so. The creditors therefore would be in no worse position.

[LAWRENCE J. If these costs are not necessaries, how can the Court apply the infants' property in paying them ?]

Hansell. They have put their property into the hands of the Court.

[LAWRENCE J. The Court administers that property for their benefit. According to the Chancery practice infants cannot pay money into Court. If these bankruptcy proceedings are altogether null and void the Official Receiver is in possession of assets which now no longer belong to him.

ASTBURY J. It is a troublesome point. In *Lovell* v. *Beauchamp* (1), however, there was an adjudication against a firm consisting of an adult and an infant partner. The House of Lords decided that though the adjudication was void against the infant, who as an infant was not liable for the firm's debts, the partnership assets must be applied in payment of the partnership liabilities and costs before the infant received any share thereof.

LAWRENCE J. In that case one of the partners was an adult, and there was therefore an enforceable claim against the joint estate. Here both partners are infants, and there is no such enforceable claim. The only order consistent

(1) [1894] A. C. 607, 611, 613, 614.

with a total annulment of the bankruptcy proceedings is to make no order as to costs.

ASTBURY J. Although these infants are not liable in contract, and there is no debt, they have in fact obtained assets from other people for which they are not liable to pay. They have handed those assets to the Court in an endeavour to take advantage of the bankruptcy law. Quite apart from their infancy, what equity have they got to recover those assets without paying the costs necessarily incurred by their action? Are they not estopped from so doing?

LAWRENCE J. I cannot see how infants can be estopped in this way. If they hand over money to any one, the recipient cannot retain it.]

Hansell. Possibly not, if the recipient were a single creditor. But here the infants, who had a right to deal with their assets as they chose, have handed them to the Court to administer in bankruptcy with the necessary consequence of costs.

[LAWRENCE J. But that is the very thing they had no right to do, as we have already decided in your favour.]

Hansell. They could not do it for their own advantage so as to get rid of their so-called liabilities. But they could hand the 28*l.* to the Court and request the Court to apply it in accordance with the Act and Rules. It is no doubt a very difficult point.

[ASTBURY J. All the Court decides is that the infants are not liable in debt, and therefore no receiving order or adjudication can be made against them. But they are in possession of assets, which they have not paid for, but which nevertheless belong to them. For their own purposes and to relieve themselves as they think of their liabilities they file their own petition and cause their assets to get into the Official Receiver's hands. My brother says that they cannot do that. I am not so sure. They cannot get an effective adjudication, and their petition, if properly tried, would be dismissed. But in this particular case they have in fact handed over their property to the Official Receiver, who as an officer of the Court has to administer it. The only

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administration that he can now make is to hand the property back. But is he not entitled to deduct the costs that the infants have compelled him to incur ?]

Hansell. That is my submission. It was their voluntary act. If they had bought a watch for cash, the vendor would not have to refund the money. The Official Receiver has in fact dealt with the assets as the infants and the county court directed.

[ASTBURY J. The Infants Relief Act does not prohibit an infant from trying to make himself bankrupt. Neither does it prohibit an infant from voluntarily handing over his property to a third person and saying, " These debts are not legally enforceable, but I voluntarily give you this money and request you to pay them." I very much doubt whether the infant could recover the money without allowing the costs of complying with his perfectly legitimate request.]

Hansell. Especially if that request has been already carried out during the proceedings initiated by the infant.

[LAWRENCE J. I should have thought that the Official Receiver, who repudiates the proceedings in toto, could not deduct a single penny.]

ASTBURY J. I am extremely loth to differ from my brother, who is far more likely to be right than I am. He takes one view and, as at present advised, I take another. If the Court is divided it cannot make any order, and I think the simplest way really will be to make no order beyond discharging the receiving order and annulling the adjudication and leave the Official Receiver to take any steps he is advised as to the assets in his hands. There will be no order by this Court upon the Official Receiver to hand any definite amount of assets back, and no order as to costs.

LAWRENCE J. I agree. If the Official Receiver has any lien as trustee he may be able to enforce it.

Solicitor : *Solicitor, Board of Trade.*

G. R. A.

In re CLAYTON'S SETTLED ESTATES.

RUSSELL J.

1926 Feb. 3, 4.

[1926. C. 263.]

Settled Lands contained in one Settlement—Settlement existing on January 1, 1926—*Principal vesting Deed—Separate Parcels of Land in separate vesting Deeds—Interpretation Act,* 1889 (52 *&* 53 *Vict. c.* 63), *s.* 1—*Settled Land Act,* 1925 (15 *Geo.* 5, *c.* 18), *ss.* 10, 35, 93, 110; *s.* 1, *sub-s.* 2, *of para.* 1, *Sch. II.*

Sect. 1 of the Interpretation Act, 1889, provides that in every Act passed after 1850, unless the contrary intention appears, words in the singular shall include the plural. As no contrary intention appears in the Settled Land Act, 1925, the expression "vesting deed" includes vesting deeds, and therefore, in the case of a settlement subsisting at the date of the commencement of the Act, it is not necessary that the whole of the settled land should be comprised in one single principal vesting deed. Different parcels of the settled land may be comprised in separate principal vesting deeds. No vesting deed is required in respect of capital moneys subsisting at the date of the commencement of the Act. The Act only contemplates a vesting deed in respect of land, and capital moneys are not land within the meaning of the Act.

ADJOURNED SUMMONS.

By his will, Nathaniel Clayton, who died in 1895, settled property consisting of land in different parts of the country, tithe rentcharges, mines and minerals, and a large sum representing capital moneys. The trustees of the settlement desired to sell a block of property in Newcastle-on-Tyne on February 18, 1926, and unless a separate vesting deed could be executed the sale would be delayed. The trustees therefore took out a summons under s. 93 of the Settled Land Act, 1925, to determine (1.) whether upon the execution of a principal vesting deed relating to the settled land pursuant to cl. 2 of para. 1 of the Second Schedule to the Settled Land Act, 1925, the whole of the land subject to the settlement ought to be comprised therein, or whether the different parts of the settled land could be comprised respectively in different principal vesting deeds; and (2.) whether any principal or other vesting deed required to be made in respect of capital moneys subsisting on January 1, 1926. The settlement was one that existed at the commencement

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of the Settled Land Act, 1925, and s. 37 provided that "the transitional provisions set out in the Second Schedule to this Act shall have effect as regards settlements existing at the commencement of this Act." Para. 1 of the Second Schedule provided: "(1.) A settlement subsisting at the commencing of this Act is, for the purposes of this Act, a trust instrument. (2.) As soon as practicable after the commencement of this Act, the trustees for the purposes of this Act of every settlement of land subsisting at the commencement of this Act (whether or not the settled land is already vested in them), may and on the request of the tenant for life or statutory owner, shall at the cost of the trust estate, execute a principal vesting deed (containing the proper statements and particulars) declaring that the legal estate in the settled land shall vest or is vested in the person or persons therein named (being the tenant for life or statutory owner, and including themselves if they are the statutory owners), and such deed shall (unless the legal estate is already so vested) operate to convey or vest the legal estate in the settled land to or in the person or persons aforesaid and, if more than one, as joint tenants." The Interpretation Act, 1889, provided: "Sect. 1.—(1.) In this Act and in every Act passed after the year 1850, whether before or after the commencement of this Act, unless the contrary intention appears . . . . (*b*) words in the singular shall include the plural, and words in the plural shall include the singular."

J. M. Lightwood for the trustees. The Settled Land Act, 1925, is framed on the assumption that there will be only one vesting deed, but s. 1 of the Interpretation Act, 1889, provides that, in every Act passed after 1850, words in the singular shall include the plural, unless the contrary intention appears. It is submitted that not only no contrary intention appears in the Settled Land Act, but certain sections suggest that there may be more than one principal vesting deed.

Thus in s. 5, sub-s. 1, we find the expression "every vesting deed for giving effect to a settlement," and in cl. 4 of para. 1, Sch. II., "if default is made in the execution of

any such principal vesting deed." It is immaterial that the form of vesting deed in the First Schedule for giving effect to a settlement subsisting at the commencement of the Act contemplates a single vesting deed. As is shown by s. 15 the form is only an example of forms that may be used. So too in the proviso to s. 110, sub-s. 2, although the draftsman has considered only one vesting deed, full effect can be given to the section on the assumption that there are several, and that the purchaser only sees one. It is submitted that the Interpretation Act, 1889, applies, and that separate parcels of the settled land may be comprised in separate vesting deeds.

R. M. Pattisson for the tenant for life. There is sufficient in the Settled Land Act to show that it was not intended when using the singular to include the plural. In the relevant sections reference is only made to one vesting deed. The Act is framed in such a way that it appears the Interpretation Act, 1889, is not to apply. In no section is there a suggestion that more than one principal vesting deed should be executed at one time, and the Act contemplates that when the vesting deed is executed it shall contain the whole of the settled lands. On the other hand there are provisions which are only consistent with there being only one principal vesting deed. Thus in ss. 10 and 35 the words are "last or only principal vesting instrument," and in s. 110, sub-s. 2, "provided that as regards the first vesting instrument executed for the purpose of giving effect to (*a*) settlements subsisting at the date of the commencement of this Act. . . . ."

There is also the fact that the form of vesting deed for the purpose of giving effect to such a settlement as this, the first form in the First Schedule, in terms includes the whole of the settled land.

RUSSELL J. This is the case of a settlement existing at the date of the commencement of the Settled Land Act, 1925, and the question I have to determine depends entirely upon what is the true construction of the Second Schedule to the Act, which deals with the transitional provisions affecting existing

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settlements and, in para. 1, with the provisions for vesting the legal estate in the tenant for life or statutory owner. Para. 1, clauses 1 and 2, are as follows: [His Lordship read the clauses.] Taken literally the words of cl. 2 only refer to a single vesting deed, but the Interpretation Act, 1889, provides, in s. 1, that unless a contrary intention appears words in the singular shall include the plural. Unless, therefore, a contrary intention appears in the Settled Land Act the reference in the Second Schedule to "vesting deed" would include vesting deeds, and several principal vesting deeds may be executed, each comprising different portions of the settled land, and in cl. 2 the expression "settled land" would mean the land comprised in the particular vesting deed.

The question I have to determine is: Does a contrary intention appear in the Settled Land Act, 1925? I have been referred to various sections of the Act, and I have come to the conclusion that I can find no such contrary intention. The only provisions which create any difficulty or raise any question are the following. The First Schedule contains forms of different instruments. The reference to them in the body of the Act is in s. 15, which enacts that "examples of instruments framed in accordance with the provisions of this Act are contained in the First Schedule to this Act." When you turn to the First Schedule you find that Form No. 1 is a form of a vesting deed for giving effect to a settlement subsisting at the commencement of this Act. The form there given is obviously a form intended and in terms expressed to include the whole of the land subject to the settlement. It is made between the trustee of the one part and the tenant for life of the other part, and after various recitals, the operative part proceeds as follows: "Now for giving effect to the requirements of the Settled Land Act, 1925, this deed witnesseth as follows: 1. The trustees as trustees hereby declare that—all and singular the hereditaments and premises respectively mentioned in the First and Second Schedules hereto and all other (if any) the premises capable of being vested by this declaration which are now by any means

subject to the limitations of the recited settlement are vested in the said tenant for life. . . . ."

There is a note telling you to add the schedules, what hereditaments to put in each, and to give particulars of the freehold land, referring, if possible, to annexed plans, so that the vesting deed may ultimately become a convenient root of title. No doubt that shows that the draftsman had in mind that normally there would be a single vesting deed comprising the whole of the land subject to the settlement. After all, that is only given as an example, and there is nothing in that which is inconsistent with the view which I take as to the construction of the Second Schedule, that under it you may, if you choose, have more than one principal vesting deed.

Then ss. 10 and 35 and other sections were referred to, where the expression occurs: "the last or only principal vesting instrument," and it is suggested that the use of the word "only" in those sections necessitates that there should be only one principal vesting deed. The word "only" undoubtedly tends that way, but it is not, in my opinion, sufficient to exclude the application of the Interpretation Act to the Second Schedule. Again reference was made to s. 110, and that was pointed out as another indication that one single principal vesting deed was contemplated by the Act. That point turns upon the words of the proviso in that section, which contains the expression: "Provided that, as regards the first vesting instrument executed for the purpose of giving effect to—(*a*) a settlement subsisting at the commencement of this Act." There, again, I do not find that is a strong enough indication to prevent the application of the Interpretation Act to the Second Schedule.

In my opinion, having considered these sections and the careful argument of Mr. Pattisson, there is nothing in the Settled Land Act, 1925, which would justify me in saying that the Interpretation Act does not apply to the Second Schedule; and accordingly, I hold and decide that in the case of a settlement subsisting at the commencement of the Act, it is not necessary that the whole of the settled land

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should be comprised in one single principal vesting deed, but that it is open to the parties to execute more than one principal vesting deed, each such deed comprising different parcels of the settled land.

As to the second question raised in the summons—namely, whether any principal or other vesting deed requires to be made in respect of capital moneys subsisting on January 1, 1926—it is quite clear that no vesting deed is required. The Act only contemplates a vesting deed with regard to land, and capital moneys are not land within the meaning of this Act.

Solicitors: *King, Wigg & Brightman, for Clayton & Gibson, Newcastle-upon-Tyne.*

J. B. B. M.

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In re STOLLERY.

WEIR *v.* TREASURY SOLICITOR.

[1924. S. 808.]

Evidence—Marriage—No Marriage Certificate—Certificates of Birth and Death of Children as Proof of Parents' Marriage—Admissibility—Births and Deaths Registration Act, 1836 (6 & 7 *Will.* 4, *c.* 86), *ss.* 17, 18, 38—*Births and Deaths Registration Act*, 1874 (37 & 38 *Vict. c.* 88), *ss.* 1, 7, 9, 20, 47.

In an action brought by the plaintiffs, who claimed to be two of the next of kin of an intestate, for administration of her estate, the usual order for inquiries as to the next of kin and heir at law of the intestate was made. In taking those inquiries before the Master it became necessary to prove the lawful marriage of the parents of the intestate before her birth and, as no record of the marriage could be found, a summons was taken out by the plaintiffs for the determination of the question whether three certificates of birth of three of the children (including the intestate) of those parents and a certificate of death of one of those children were prima facie or any evidence of the lawful marriage of the parents:—

Held, by Romer J. (following *In re Wintle* (1870) L. R. 9 Eq. 373 and *Bird* v. *Keep* [1918] 2 K. B. 692), that none of the certificates was evidence of the marriage of the parents.

Held, by the Court of Appeal (reversing the decision of Romer J.), that the certificates were admissible, but not alone sufficient, because taken by themselves they did not identify the persons therein

mentioned. It would be for the Master at the inquiry to determine whether the certificates, taken in conjunction with the other evidence adduced before him, were sufficient to establish the fact of marriage between the parents in question.

Wilton & Co. v. *Phillips* (1903) 19 Times L. R. 390; *In the Estate of Goodrich* [1904] P. 138; and *Brierley* v. *Brierley* [1918] P. 257 followed.

Bird v. *Keep* [1918] 2 K. B. 692 distinguished.

In re Wintle L. R. 9 Eq. 373 overruled.

ADJOURNED SUMMONS.

Mrs. Cecilia Lucy Stollery, a widow, died on December 2, 1921, intestate, without issue, and without any then known relatives. On January 3, 1922, administration to her personal estate was granted to the Treasury Solicitor. On February 24, 1924, an originating summons was taken out by Reuben John Weir and Joseph Weir, who claimed to be two next of kin of the intestate, against the Treasury Solicitor, as administrator, asking for administration of her estate. On November 5, 1924, an order was made directing the usual inquiries as to the next of kin and heir at law of the intestate. In the course of those inquiries before the Master the question was raised whether John Brown and Lucy Elizabeth Weir (1), the parents of the intestate, were lawfully married at the time of her birth. In view of the fact that no record of the marriage could be found, this summons was, on October 28, 1925, taken out by the plaintiffs for the determination of the question whether the following certified copies of entries in a register of births, deaths, and marriages were prima facie or any evidence of the lawful marriage of John Brown and Lucy Elizabeth Weir: (*a*) A certified copy of an entry of the death of Harriett Ellen Brown; (*b*) A certified copy of an entry of the birth of John Brown (the younger); (*c*) A certified copy of an entry of the birth of Harriett Ellen Brown; (*d*) A certified copy of an entry of the birth of Mary Ann Wyers Brown.

From these four certificates it appeared that Harriett Ellen Brown, John Brown, the younger, and Mary Ann Wyers Brown were the children of John Brown and Lucy Elizabeth Weir.

(1) The name is variously spelt *Weir*, *Wyers*, *Wire* and *Wiers* in the different documents sought to be adduced in evidence.

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The entries in each of the certificates of birth duly described the date and place of birth, the name and sex of the child, the name and surname of the father, the name and maiden surname of the mother, the rank or profession of the father, and the mark, description, and residence of the informant (the mother). The certificate of death contained the date and place of death, the name, sex and age of the deceased, the rank or profession of the father, the cause of death and the mark, description, and residence of the informant (the mother).

In the evidence in support of the originating summons it was stated that Mary Ann Wyres Brown (referred to in certificate "(*d*)") was the same person as Cecilia Lucy Weir Brown (named in a certificate of marriage between Cecilia Lucy Weir Brown and Richard Newton Stollery), she having for some reason assumed the name of Cecilia Lucy Weir Brown.

In order to identify the name of the mother in the certificate of death (which was then given as "Elizabeth Atkin") with that of Lucy Elizabeth Brown a certificate was produced of a marriage between Lucy Elizabeth Brown with one Atkin after the death of John Brown. In the register to which she attached her mark on that occasion she described herself not as "Lucy Elizabeth Brown," but as "Lucy Elizabeth Wiers, spinster."

The summons came on for hearing before Romer J. on December 3, 1925.

Hughes K.C. and *Bertram Long* for the plaintiffs. The statement of the mother, in the certificates, that the child is the child of herself and John Brown is a statement that the child is the child of herself and her husband, John Brown. *In re Wintle* (1), which is prima facie a decision contrary to the plaintiffs' contention, was disapproved of in *In the Estate of Goodrich* (2) : see also *Wilton & Co.* v. *Phillips* (3) ; *In re Thompson* (4) ; *Brierley* v. *Brierley.* (5) In *Reg.* v. *Weaver* (6) it was decided that a certificate is a proper

(1) L. R. 9 Eq. 373.
(2) [1904] P. 138.
(3) 19 Times L. R. 390.
(4) (1904) 91 L. T. 680.
(5) [1918] P. 257.
(6) (1873) L. R. 2 C. C. 85.

way of proving the register. The certificate is evidence, though, of course, not conclusive evidence, of the various facts stated in it. Certificate (*d*) is a statement by L. E. Brown, signed by her, informing the registrar: (1.) that she has a child; (2.) that her name was formerly "Wyres"; (3.) that the child is a child of John Brown, and (4.) that the name of the child is as therein stated. That information is evidence that the child is the lawful child of the father and the mother therein named. This entry and the entries in the other certificates of birth were made before the Births and Deaths Registration Act, 1874, so that the provision in s. 7 of that Act (1), that the entry of the father's name in the case of an illegitimate child could not be made unless at the joint request of the mother and of the father himself, was not then in force. The statement, therefore, that John Brown is the father is a statement that he is the lawful father. The two remaining birth certificates do not carry the matter any further. They merely show that the statement of the mother was repeated at intervals. With regard to the general law relating to statements as to pedigree made by members of the family see Taylor on Evidence, 11th ed., p. 437. The rule as to pedigree extends to every sort of statement, whether verbal or written, made by a member of the family as to pedigree. Proof of signature is not necessary. A document thirty years old proves itself: Taylor on Evidence, 11th ed., p. 93, § 87; *Wynne* v. *Tyrwhitt* (2); see also Halsbury's Laws of England, vol. xiii., p. 505. As to the presumption that persons who lived together were married being a very strong presumption: see *De Thoren* v. *Attorney-General*. (3)

Farwell K.C. and *Dighton Pollock* for the defendant. There are three distinct questions: (1.) whether a certificate of

(1) Births and Deaths Registration Act, 1874, s. 7: "In the case of an illegitimate child no person shall, as father of such child, be required to give information under this Act concerning the birth of such child, and the registrar shall not enter in the register the name of any person as father of such child, unless at the joint request of the mother and of the person acknowledging himself to be the father of such child, and such person shall in such case sign the register, together with the mother."

(2) (1821) 4 B. & Al. 376.

(3) (1876) 1 App. Cas. 686.

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birth or death is more than evidence of the fact of the birth or death which it records; (2.) whether, assuming that it is right to say that these certificates are not evidence of more than birth or death they can be used as evidence of pedigree; (3.) whether it is possible to take a certificate of birth, even assuming it to be a declaration, and from that necessarily to infer a marriage. It is a fallacy to say that a document, which contains statements, produced from proper custody, is evidence of the truth of those statements, unless the statements are statements known to the person making the entry. The registrar merely fills up the form by entering the facts stated to him. He is not bound to verify them: *Doe* v. *Barnes*. (1) By s. 9 of the Act of 1874 it is provided that in a certificate of death the cause of death shall be entered by the registrar: see also ss. 20 and 47. In *Bird* v. *Keep* (2) a question arose whether a certificate of death was evidence of the cause of death, and the Court held that it was not so admissible. The registrar is expressly directed to enter the cause of death, and the certificate of the coroner or of the doctor must be produced to him. The observation of Lord Romilly in *In re Wintle* (3) is true. The certificate is evidence of birth at the date when the entry in the register is made and no more. The Act of 1874 did not impose any further obligations on the registrar than those imposed on him by the Births, Deaths and Registration Act, 1836. It is not the general law that every document produced by an official from official custody is evidence of everything which it contains. On the first point, under the general law and apart from the sections of the Acts of 1836 and 1874, the certificate is evidence of nothing more than the statements of a particular person calling herself by a particular name in the presence of the registrar. Evidence of the truth of the contents of a document produced from official custody must be evidence of the matters within the knowledge of the person who filed the document. If that proposition were not correct, *Bird* v. *Keep* (4) would have been decided

(1) (1834) 1 Moo. & R. 386, 389.
(2) [1918] 2 K. B. 692, 697, 704.
(3) L. R. 9 Eq. 373.
(4) [1918] 2 K. B. 692, 698.

differently. A marriage certificate is evidence of the date of the marriage, because the person who certified was present at the ceremony.

As to the second question, these certificates are not declarations such as are admissible in a pedigree case: see Taylor on Evidence, 11th ed., p. 440. The certificate is, at the most, evidence that a child was born and that the informant states that the child was a male or female and was born on a particular date. The observation of Swinfen Eady M.R. in *Bird* v. *Keep* (1) that the rule stated by Lord Romilly in *In re Wintle* (2) has been the rule acted upon in Chancery overrules the decisions which are contrary to the latter case.

In the present certificates the name of the father, but not necessarily the legal father, had to be registered. After 1874 the position was different. If the "father" whose name was to be registered, under the earlier statute was meant to be confined to fathers of legitimate children there was no need for the insertion of the provision relating to the father of an illegitimate child set out in s. 7 of that statute. On this point see *In re Turner* (3); *Cope* v. *Cope* (4); *Sturla* v. *Freccia*. (5) *Robinson* v. *Duke of Buccleuch* (6) is a decision of the Court of Appeal apparently inconsistent with that of Chitty J. in *In re Turner* (3); therefore, even if the latter case seems to be against the plaintiffs' contention, it is disposed of by *Robinson* v. *Duke of Buccleuch*. (6) If their submission on the first point is correct, there is, then, no evidence, that the person who made the declaration was the parent of the child, other than that person's own statement, and that is insufficient. It is essential to prove that the declarant is a relative of the family about which he makes the declaration. The declaration is not admissible in evidence without some proof that the person who made the declaration was the person he purported to be: *Fitzwalter Peerage Case*. (7) The

(1) [1918] 2 K. B. 692, 698.
(2) L. R. 9 Eq. 373.
(3) (1885) 29 Ch. D. 985, 990.
(4) (1833) 1 Moo. & R. 269.
(5) (1880) 5 App. Cas. 623, 641.
(6) (1887) 3 Times L. R. 472.
(7) (1843) 10 Cl. & F. 193.

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fact of relationship must be proved: Taylor on Evidence, 11th ed., p. 440, § 640.

With regard to the third question, if the Court does not accept the contentions of the defendant on the first and second questions and holds that the certificates are admissible as evidence, such a decision is of no assistance to the plaintiffs, unless it can be said that they are evidence of the marriage of two persons one of whom is called John Brown and the other Lucy Elizabeth Brown. It is inconceivable that this can be proved either by the birth certificates or the death certificate. In the death certificate it is not essential to record the father's name (see the Schedule to the Act of 1836). None of the certificates referred to are evidence of the lawful marriage of John Brown and Lucy Elizabeth Brown.

Hughes K.C. in reply. The question is whether these documents are some evidence of the marriage of the parents. It is not disputed that this is a question of pedigree evidence, as to which see Taylor on Evidence, 11th ed., p. 441, § 642. The register must, having regard to *In re Wintle* (1), be evidence of the fact of birth and of the parentage. With regard to *Bird* v. *Keep* (2) the entry of the cause of death stands on a different footing. The object of stating the cause of death is purely temporary—namely, to justify burial: see s. 27 of the Act of 1836. The other provisions are for pedigree purposes. All that the decision in *Bird* v. *Keep* (2) amounts to on this point is that the certificate was not admissible as evidence of the cause of death. It was quite unnecessary to go into that question in that case, as there was ample evidence of the cause of death without the certificate. These certificates are some evidence of the marriage and of the fact that these children were the lawful children of their parents. Whether they are sufficient evidence is not at present before the Court.

ROMER J. In this case an inquiry has been directed by the Court for the purpose of ascertaining who are the next of kin of Cecilia Lucy Stollery, deceased. Mr. Hughes

(1) L. R. 9 Eq. 373. (2) [1918] 2 K. B. 692.

appears for some persons claiming to be some of the next of kin, and for the purposes of his case he finds it necessary to prove the marriage of two persons named John Brown and Lucy Elizabeth Wire. The question that I am asked on this summons to determine is whether certain certified copies of entries in the Registers of Births and Deaths are prima facie, or any, evidence of such marriage. The certificates of birth in question are certificates of the births of three persons, Mary Ann, Harriett Ellen and John, who were children of this Lucy Elizabeth Wire. The entries duly describe the place where, and the time at which, the child in question was born, the name of the child, the sex of the child, the name and surname of the father, and the name and maiden surname of the mother. In each case the father is stated to have been John Brown and the mother's maiden surname is given as "Wire." In the case of the certificate of death, which is a certificate of the death of one of those children—namely, Harriett Ellen, she is described in the certificate as "Harriett Ellen Brown," and as having been the daughter of John Brown, a jeweller, deceased. The question accordingly is whether those certificates, first of all, are evidence of the fact that the children in question were the legitimate children of John Brown and Elizabeth Brown, and, if so, whether they are consequently evidence of a marriage between those two persons. The certificates of birth were made before the Registration Act of 1874 was in force, and at a time when the Act in force governing such matters was the Births and Deaths Registration Act, 1836. At the time when the registration of death was made the Act in force was the Act of 1874, but I think that, for the purposes of this case, there is really no distinction between the two Acts, except in regard to one matter to which I shall refer later.

Referring to the Act of 1836 I find that by s. 17 it is provided that "the Registrar-General shall cause to be printed on account of the said register office a sufficient number of register books for making entries of all births, deaths, and marriages of His Majesty's subjects in England, according to the forms of Schs. A, B, C to this Act annexed." When one

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looks at Sch. A, which is the schedule which refers to the registration of births, one finds that there are various headings under which information is to be entered. Amongst others are these: The date when the child was born, the name of the child, the sex of the child, the name and surname of the father, the name and maiden surname of the mother, and the rank or profession of the father. In the schedule dealing with the registration of deaths there is a form which shows that what is, amongst other things, required to be entered in the register is the date of death, the name and surname, the sex and age of the deceased, and his or her rank or profession. By s. 18 every registrar is required to inform himself carefully of every birth and every death which shall happen within his district and to learn and register as soon after the event as conveniently may be done the particulars required to be registered according to the forms in the Schs. A and B. Then s. 19 provides: "That the father or mother of any child born, or the occupier of every house or tenement in England in which any birth or death shall happen . . . . may . . . . give notice of such birth or death to the registrar of the district." Then s. 20 provides: "That the father or mother of every child born . . . . or, in the case of the death, illness, absence, or inability of the father and mother, the occupier of the house or tenement in which such child shall have been born, shall, within forty-two days next after the date of every such birth, give information, upon being requested so to do, to the said registrar, according to the best of his or her knowledge and belief, of the several particulars hereby required to be known and registered touching the birth of such child." The particulars referred to there are no doubt the particulars which according to the Sch. A are to be inserted in the register in respect of births. Then s. 38 of the Act provides as follows: "And be it enacted that the Registrar-General shall cause to be made a seal of the said register office, and the Registrar-General shall cause to be sealed or stamped therewith all certified copies of entries given in the said office; and all certified copies of entries purporting to be sealed or stamped with the seal of the said

register office shall be received as evidence of the birth, death, or marriage to which the same relates, without any further or other proof of such entry. . . . ." On the wording of that section the question necessarily arises whether the certificate is to be evidence of the mere fact of the birth, marriage, or death, or whether it is to be evidence of a birth, marriage, or death, with all the circumstances as to time, locality, and parents which are to be required to be entered in the register. On that point there has been a conflict of judicial authority.

The first of the cases to which my attention was called was a decision of Lord Romilly in *In re Wintle.* (1) The point there was as to the time when a certain child attained the age of twenty-one years, for upon attaining that age the child was entitled to certain funds in Court. For the purposes of proving that the child had attained the age of twenty-one years a certificate of birth was put in as evidence of the date of the birth of the child. Lord Romilly said (2): "The Act makes the entry in the register evidence of the fact of birth, and nothing more; and therefore I have always held that it is evidence only of the child having been born before the entry was made." In other words, he came to the conclusion that the certificate was not by the Act made evidence of the date of the birth, but merely of the fact of the birth. I think he must have meant by that the birth of the particular child named in the certificate to the particular mother mentioned in the certificate, for a birth is necessarily the giving birth by a particular woman to a particular child. Lord Romilly, however, declined to hold that the certificate of birth was evidence of the date of the birth, although by the Act the date of the birth was required to be entered in the certificate. He was therefore clearly of opinion that the certificate was not evidence of everything that was required by the Act to be entered in the register.

The next case cited was *Wilton & Co.* v. *Phillips* (3), which came before Phillimore J. The question in the case was

(1) L. R. 9 Eq. 373. (2) Ibid. 374.
(3) 19 Times L. R. 390.

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as to the age of a particular person. It was proposed to give evidence of his age by the production of the certificate of birth, and evidence of the defendant's brother as to identity. Phillimore J., to whom *In re Wintle* (1) had been cited, said, when the case was cited (2): "The register also states when the child was born," and he subsequently held that the certificate of birth, together with evidence of identification, was sufficient. According to the report, Phillimore J. gave a somewhat extraordinary reason for coming to that conclusion. He is reported to have held that a public document coming from the proper place or a certified copy of it was sufficient proof of every particular stated in it. I doubt if the learned judge could have expressed himself in such wide terms as that. A public document is not evidence of every fact that is stated in it. That sufficiently appears from the case which was cited to me of *Doe* v. *Barnes* (3), where Lord Denman made these observations as to a register of marriages: "This"—that is the register of marriages—"must be evidence in itself, as the clergyman must be present, and it is his duty to enter the marriage correctly, and this fact of the time is within his own knowledge." Therefore the entry made by the clergyman in the register of marriages is evidence of the date of the marriage, because the date of the marriage must necessarily have been in the knowledge of the clergyman who made the entry. Then Lord Denman went on as follows: "In the case of the registry of baptism, the time of the birth must generally be taken by the clergyman from other people; and if the case cited"—that is *Rex* v. *North Petherton* (4)—"goes to the extent stated, it cannot, I think, be supported." So that he drew a distinction, which has been drawn in many other cases in relation to public documents, between entries in such documents made by a person who had knowledge of the facts he was entering, and entries made by persons of facts of which they had no personal knowledge. However, there is no doubt that in *Wilton & Co.* v. *Phillips* (2) Phillimore J. did accept as

(1) L. R. 9 Eq. 373.
(2) 19 Times L. R. 390.
(3) 1 Moo. & R. 386, 389.
(4) (1826) 5 B. & C. 508.

evidence of the date of birth a certificate of the entry in the register.

The next case was *In the Estate of Goodrich* (1), a case before Sir Francis Jeune. The headnote is: "A certified copy of an entry in a register of births made pursuant to the statute 6 & 7 Will. 4, c. 86, is evidence, not merely of the fact of birth before the date of registration, but of the actual date of birth." *In re Wintle* (2) had been cited to Sir Francis Jeune, but he declined to follow it. He said in reference to this particular point: "Then, of what is it evidence? I think it is evidence of what the Act requires to be stated. Now, the Act 'requires,' in the limited sense of the word, that the date of birth shall be given, because it refers to Sch. A, given in the authorized form in the Act of 1836 (6 & 7 Will. 4, c. 86). Against that there is the decision of Lord Romilly in the case of *In re Wintle*. (2) I quite admit that Lord Romilly does draw a distinction between the evidence of the fact of the child's birth and the evidence of the actual date of its birth. But that decision of Lord Romilly, so far as I know, and so far as the ingenuity and great research of the learned counsel have been able to discover, has not any support in later authorities. On the contrary, the statement in the text-book, I think, shows that it was not carried further; and the case of *Reg.* v. *Weaver* (3), which was cited by Mr. Priestley—a criminal case in which the accused person would not have been found guilty unless the law clearly supported such a conviction—appears to me conclusive to show that the certificate is evidence of its contents, and, among its contents, is the date of the birth. In fact, I always thought that this constituted the ordinary means of proving the date of a birth, and that, in the usual procedure in Courts of justice, it was so treated." It would appear from a judgment of Swinfen Eady M.R., to which I shall refer presently, that Sir Francis Jeune was not right in thinking that that was the rule in the Chancery Division. It is, however, obvious that his decision is founded on the view that the certificate is

(1) [1904] P. 138, 140. (2) L. R. 9 Eq. 373.
(3) L. R. 2 C. C. 85.

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evidence, not only of the fact of the birth, marriage or death, as the case may be, but of every fact that, according to the Schedules to the Act, is required to be entered in the register. In the end, therefore, he arrived at the same conclusion as Phillimore J.

Both those cases, as well as *In re Wintle* (1), were considered by McCardie J. in *Brierley* v. *Brierley* (2), but I think before I go to that case I ought to refer to *Reg.* v. *Weaver* (3), which was referred to by Phillimore J. in the passage which I have just read from his judgment. In that case the point actually decided was no more than this, that a certified copy of an entry in the register of births was admissible in evidence, without any further proof as to the person who made the entry. It came before the Court to decide this particular point: "Whether the reception of the certified copy of the register, as tendered by counsel for the prosecution, without calling a witness to produce it"—that is the register—"was right, and, coupled with the evidence of the child's grandmother, was sufficient to support the finding of the jury." It was a criminal case in which a person had been indicted for carnally knowing a girl under the age of twelve years, and it was therefore necessary, in order to secure a conviction, to prove the date of the girl's birth. For that purpose a certified copy of the entry in the register of births was produced. Undoubtedly it appears to have been received in the proceedings as evidence of the date of the girl's birth. But the only point for decision actually reserved for the Court was the one to which I have referred, and that is the only point decided by the Court. There was no decision whether the certified copy of the entry in the register of births was, or was not, evidence of the date of the birth.

Going to *Brierley* v. *Brierley* (2) the question arose as to the date of the birth of a particular child. They were divorce proceedings, and the impossibility of access of the husband to the wife had been proved. Access of the

(1) L. R. 9 Eq. 373. (2) [1918] P. 257.
(3) L. R. 2 C. C. 85, 86.

husband to the wife had been impossible during the particular period, and it was desired to show that during that period the wife had conceived a child. For that purpose the certificate of birth of the child was produced, and McCardie J., basing his decision, as I understand it, entirely upon s. 38 of the Act, said this (1): "The effect of a certificate given under these Acts is considered in *Reg.* v. *Weaver* (2), in which case it was decided that public documents or duly certified copies thereof are admissible in evidence on mere production. This case appears to have impliedly decided, moreover, that a duly certified certificate of birth was prima facie evidence of the date as well as the fact of birth"—it only did so, I think, in the sense that I have mentioned. McCardie J. continued: "Lord Romilly in *In re Wintle* (3) expressed the view that an entry in the register or a certified copy thereof establishes the fact of a birth and nothing more. To so hold in my view impairs and restricts the utility of the statutes. Later, before Phillimore J., in *Wilton & Co.* v. *Phillips* (4), the question arose whether a certified extract from the register is evidence of the date of birth. The case of *In re Wintle* (3) was cited, but, in spite of the decision of Lord Romilly in that case, Phillimore J. held that a certified extract is sufficient evidence of the date as well as the fact of birth. Phillimore J. stated that a certified copy is prima facie proof of all such matters as are required as particulars by the statutes"—according to the report that I have read Phillimore J. did not base his decision upon that ground, but upon the more general ground that a public document is evidence of all facts stated in it. The judgment of McCardie J. proceeds: "It does not appear that in that case *In the Estate of Goodrich* (5) was cited, in which Jeune P. held that a certified copy made in pursuance of the Acts is evidence not merely of the fact of the birth, but also of its date. In order to remove doubt with regard to the authorities and as to a point of practice, I think it well to state that in my opinion

(1) [1918] P. 259.
(2) L. R. 2 C. C. 85, 86.
(3) L. R. 9 Eq. 373.
(4) 19 Times L. R. 390.
(5) [1904] P. 138.

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Lord Romilly's decision in *In re Wintle* (1) is not law, and that the correct decisions on this point are those of Jeune P. and Phillimore J., which are in conformity with the Acts of Parliament and recognize the principles of law appropriate thereto." McCardie J. then went on to point out that neither the register nor the certificate was in any way conclusive, but was only prima facie evidence of the facts to be established in a case such as that with which he was dealing, so that he too came to the conclusion that the certificate was evidence of all the facts which were required to be entered in the register.

If the matter had rested there I think I might have found it my duty to follow the more recent decisions to which I have referred, rather than the earlier decision of Lord Romilly. But this question was discussed before the Court of Appeal in an action of *Bird* v. *Keep.* (2) The question there was as to the cause of death of a particular person, and it was a case which had arisen under the Workmen's Compensation Act. It was an appeal from the decision of a county court judge who had rejected as evidence of the cause of the death, amongst other things, a certified copy of the entry in the register of deaths. There was, apart altogether from this certified copy, evidence upon which the Court acted, and perhaps in strictness the question of the admissibility of the certificate of death as evidence of the cause of death was not necessary for the decision to which the Court came; but notwithstanding this Swinfen Eady M.R. said that, as the matter had been argued, he would express his opinion upon it. Swinfen Eady M.R. said (3): "As the judge decided in favour of the workman's dependants without the additional evidence, the question whether it was properly rejected does not in strictness arise; but as the question is one of general importance, and has been fully argued, I think it is right to express my opinion upon it." Then he reads the material part of s. 38. Then he says: "The certificate is not by statute made evidence of the cause of death, but only of the

(1) L. R. 9 Eq. 373. (2) [1918] 2 K. B. 692.
(3) Ibid. 697, 698, 701.

death itself." Then he refers to the Act of 1874, and he points out: "Where an inquest is held on any dead body, the coroner is required to send to the registrar of deaths a certificate giving information concerning the death, and specifying the finding of the jury with respect to the particulars required to be registered concerning the death, and to the cause of death, and the registrar is to enter in the prescribed form and manner the death and particulars." So that by the Act of 1874 the registrar is expressly required to enter the cause of death in the register. Then Swinfen Eady M.R. goes on: "There is not, however, any statutory provision that all the particulars so entered shall be received in evidence. Decisions of Courts of first instance are conflicting as to whether the certificate is evidence of the date on which the event happened. Thus Lord Romilly held that the entry was evidence of the birth having taken place before the date of registration, but not of the exact date of birth: *In re Wintle.* (1) This has been the rule acted upon in Chancery. Sir Francis Jeune decided the contrary in *In the Estate of Goodrich.* (2) He purported to follow *Reg.* v. *Weaver.* (3) But that was a case stated, and the point raised by it was whether the certified copy of the entry was admissible without a witness verifying it. The case did not raise the question whether the certificate was evidence of the exact date of birth: see also *Wilton & Co.* v. *Phillips* (4) and *Brierley* v. *Brierley.* (5) Even if the entry be evidence of the exact date of the event recorded, whether birth or death, as to which I do not express any opinion, as the point has not been argued, it is not, in my opinion, evidence of the cause of death." Then he stated at the end of his judgment, with regard to Neville J., who had formed one of the Court which had decided the case: "I am desired by Neville J. to say that he agrees with the view of the Court that the county court judge's decision was right on the evidence before him, and that he does not dissent from their

(1) L. R. 9 Eq. 373.
(2) [1904] P. 138.
(3) L. R. 2 C. C. 85.
(4) 19 Times L. R. 390.
(5) [1918] P. 257.

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view on the question of the admissibility of the coroner's inquisition and the certificate of death, but that, as that question is not material to the decision of the present case, he prefers not to express any opinion upon it." Bankes L.J. said (1): "This conclusion renders it unnecessary to give any decision upon the point taken by Mr. Powell, for the respondent, that the coroner's inquisition and the depositions of the witnesses before the coroner and the certificate of death were admissible in evidence as to the cause of death, and were wrongly rejected by the county court judge. As the question has been raised and fully argued, I will give my opinion upon it." Then Bankes L.J. says (2): "The question which was raised and decided with reference to a birth certificate in the cases of *In the Estate of Goodrich* (3); *Wilton & Co.* v. *Phillips* (4); and *Brierley* v. *Brierley* (5) had reference to the date of the event recorded in the certificate. I express no opinion upon that point, but, in so far as the general statement of the law in those cases might cover a case of the cause of death, I do not agree with them. In my opinion the county court judge was right in rejecting the evidence."

It is perfectly clear that the general statement of the law in those cases did cover a case of the cause of death, because by the Act the registrar is required to enter in the register the cause of death, amongst other things. It is, therefore, in my opinion, a decision, binding upon me to the effect that a certificate of death, or of birth, is not, by the Act, made evidence of all that the Act requires to be entered in the register in respect of births or deaths. It is further, of course, a decision that the certificate is not evidence of the cause of death. I confess that I cannot myself think of any process of reasoning which should lead me to the conclusion that the section of the Act does not make the certificate evidence of the cause of death, but does make the certificate evidence in the case of a certificate of birth

(1) [1918] 2 K. B. 702.
(2) [1918] 2 K. B. 702, 704.
(3) [1904] P. 138.
(4) 19 Times L. R. 390.
(5) [1918] P. 257.

of the name of the father of the child or the maiden name of the mother of the child. The cause of death, and, in the case of a birth, the name of the father and the surname of the mother, are alike required to be entered in the register, and are alike outside the personal knowledge of the registrar. As I say, I cannot myself think of any process of reasoning by which I could come to the conclusion that s. 38 makes the certificate evidence of one of those facts, and yet does not make the certificate evidence of the others. Therefore, in view of the decision of the Court of Appeal, or perhaps the more accurate way to put it is in view of the opinion of the Court of Appeal, I do not see that I can come to the conclusion that these certificates of birth and death are evidence of the fact that John Brown was the father of the children, or that the mother's maiden name was Wyres, as it is expressed to be in the certificates of birth. So far as the certificate of death is concerned, even the decisions of Phillimore J., Sir Francis Jeune and McCardie J. would not entitle me to come to the conclusion that the certificate was evidence of the fact that the deceased was the daughter of John Brown, because that is not a matter which is required by the Act to be inserted in the register at all.

In those circumstances it is not necessary for me to consider whether, supposing that I can treat the certificates as evidence of the parentage, that is to say, evidence that John Brown was the father of these children, I ought to infer that John Brown and the mother of the children were husband and wife. There is no direct evidence in any of the certificates of the fact of any marriage having taken place between them. It is said that I ought to infer that there was such a marriage when once the facts were established that the children were the children of John Brown, and that the lady's maiden name was Wyres. In reference to that, I would like to point out that at the time that these entries of birth were made in the register there was no provision, such as is now found in s. 7 of the Act of 1874, that where children are illegitimate the name of the father is not to be entered in the register of births as the father without his consent, whereby the father of

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an illegitimate child is relieved from the responsibility, which I gather he was under by virtue of the Act of 1836, of giving information to the registrar as to the birth of the child. Therefore the fact that at that time a person is entered as the father of the children, assuming it to be evidence of the fact that he was the father, is no evidence from which the Court ought to infer that a marriage had taken place between that father and the mother of the child; indeed, the entries in the register of births in this case are quite consistent with the view that this lady was living with John Brown as his wife without there having been any valid marriage between them, and that these children were born to them in the course of such cohabitation. Had that been the case, one can well understand that John Brown would be entered as the father of the children and that the lady would give her name as Lucy Elizabeth Brown, formerly Wyres, and that is the form in which her name appears in these registers of births. Indeed, it is somewhat interesting to observe that in *Reg.* v. *Weaver* (1) the certificate which was in question was in all material respects in the same form as the certificates of birth with which I have to deal. The date of the birth was stated, and the name of the child, and the sex of the child was given. Then came this information: "Name and surname of father, Benjamin Watkins; Name and maiden surname of mother, Ann Watkins formerly Abram," and under the heading "Signature, description and residence of informant" appears "Mark of Ann Watkins, mother," and the address is given. The grandmother of the child had given evidence in that case, and in her evidence she had identified the child whom the prisoner was accused of having unlawfully known with the child named in the certificate of birth. She also proved that the said child was the illegitimate child of Ann Abraham, daughter of the witness (then in Australia) and of Benjamin Watkins, and that her daughter Ann Abraham then passed as Ann Watkins. So that in that case, oddly enough, the certificate was in precisely the same form, and contained the same sort of information, as the

(1) L. R. 2 C. C. 85.

certificate of birth here, and yet it was proved in evidence that there had been no marriage between the person entered in the register as the father and the person entered in the register as the mother of the child.

The matter does not rest there, because Mr. Hughes says that, apart altogether from s. 38 of the Act, he is entitled to treat these entries in the register as evidence, because they are signed by the mother of the children. He says, and says rightly, that this is a question of pedigree in the sense that the inquiry is of a genealogical nature, and that in such cases the declarations of deceased members of the family are always admissible in evidence as to the facts of births, marriages and deaths and so on, relating to the family. He puts his case in this way: Here is a woman who we know was the mother of these children making a declaration, because she has signed the register, that these children were the children of John Brown, and that her maiden name was Wyres, and as regards the certificate of death, she has made and signed a declaration to the effect that the deceased child was the daughter of John Brown. So far as regards the certificates of birth, the fact that she was the mother of the children is, in my opinion, proved by the certificates by virtue of s. 38 of the Act. I therefore know that she was the mother of these children. Assuming, for that reason, that I am entitled to look at and receive as a declaration the entry in the register that John Brown was the father, and that the mother's maiden name was Wyres, it does not seem to me that the matter is carried any further, for the reasons that I have already given. I do not think the mere fact that she states that John Brown was the father, and that her maiden name was Wyres, is any evidence of the fact of a valid marriage having taken place between her and John Brown. In the case of the certificate of death, I think, for the same reason, that it is a mere statement that the daughter in question was a daughter of John Brown. It is said by Mr. Hughes that prima facie the word "daughter" in that declaration must mean legitimate daughter. There is this difficulty in arriving at that conclusion. The certificate is signed, not by Lucy

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Elizabeth Brown, but by one "Elizabeth Atkin," and it would be necessary, before I could admit that entry in the register as the declaration by a member of the family, that the identity of Elizabeth Atkin with Lucy Elizabeth Brown should be established. The identity is sought to be established by the production of a certificate of marriage between Lucy Elizabeth Brown and one Atkin after the death of John Brown. She did not sign her name, but in the register to which she attaches her mark she describes herself, not as Lucy Elizabeth Brown, but as "Lucy Elizabeth Wiers, Spinster." If her identity is established in that way I do not see how possibly I could arrive at the conclusion that when she uses the words "Daughter of John Brown," in describing his child, she means legitimate daughter. It appears to me that it is some evidence that she used the word "daughter" otherwise than in its legal signification. The presumption therefore which is so often drawn in construing documents that a word like "son" or "daughter" or "child" is used as prima facie meaning a legitimate son, daughter or child, could not, I think, arise in this case.

I therefore come to the conclusion that none of the certificates are evidence of the marriage of John Brown and Lucy Elizabeth Wyres, and I must answer the question put to me by this summons in that sense.

J. L. D.

C. A. The plaintiffs appealed. The appeal was heard on January 11 and 12, 1926.

Sir Thomas Hughes K.C. and *Bertram Long* for the appellants.

Farwell K.C. and *Dighton Pollock* for the respondent.

The arguments were substantially the same as those used in the Court below. The following additional authorities were referred to: *Irish Society* v. *Bishop of Derry* (1); *Doe* v. *Andrews* (2); *Russell* v. *Russell.* (3)

(1) (1846) 12 Cl. & F. 641. (2) (1850) 15 Q. B. 756.
(3) [1924] A. C. 687.

POLLOCK M.R. This is an appeal from a judgment of Romer J. dated December 9, 1925, who decided upon a summons taken out to obtain a decision upon certain points that the four certificates referred to in the summons, one relating to the death of Harriett Ellen Brown, and three relating to the births of John Brown, Harriett Ellen Brown, and Mary Ann Wyers Brown were not any evidence of the lawful marriage of the parents of those persons mentioned in those four certificates—namely, of John Brown and Lucy Elizabeth Weir.

The case arises in this way. There was a lady, Mrs. Cecilia Stollery, who was the child of the John Brown and Lucy Elizabeth Weir whom I have mentioned. She died on December 2, 1921, a widow, intestate and without children, and at the time of her death she had neither father nor mother, nor brother nor sister surviving her, and there were no relatives who could be found at the time. Therefore on January 3, 1922, administration of her personal estate was granted to the Treasury Solicitor. It appears that her estate consisted of a not inconsiderable amount of personalty and a small amount of realty. On February 24, 1924, an originating summons was taken out by Reuben John Weir and Joseph Weir, who claimed to be two of her next of kin, asking for administration of her estate. On November 5, 1924, an inquiry as to the next of kin and heir at law was directed, and upon that inquiry the question was raised as to whether the parents of Mrs. Cecilia Stollery were in fact married at the time of her birth. No record of the marriage of John Brown to Lucy Elizabeth Weir is to be found, and on October 28, 1925, a summons was taken out to determine whether the certificates to which I have referred and which are certificates of entries in the register which are in existence, were to be used as containing evidence of the lawful marriage of John Brown and Lucy Elizabeth Weir. The four certificates are the certificates of the birth of Cecilia (who is the same person as Mary Ann Wyres Brown), in 1857, of a sister, Harriett Ellen, in 1859, and of a brother John, in 1861, and of the death of Harriett Ellen in 1889. The question that is

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propounded in the summons is perhaps not happily framed, but it is in this form: "Whether the following certified copies"—to which I have referred—"of entries in a register of births, deaths and marriages are primâ facie or any evidence of the lawful marriage of John Brown and Lucy Elizabeth Weir."

Now the statute that bears upon this matter is the Births and Deaths Registration Act, 1836. By s. 38 of that Act it is provided: "All certified copies of entries purporting to be sealed or stamped with the seal of the said register office shall be received as evidence of the birth, death, or marriage to which the same relates, without any further or other proof of such entry." It is said that although by that section these certificates, which bear the proper seal of the register office, come prima facie within it, and might be used as evidence of the births of the three persons named in the certificates, in 1857, 1859 and 1861 respectively, and of the death of the person named in the certificate in 1889, yet they cannot be received as evidence of anything more, and that they do not contain anything which may be used as evidence of the lawful marriage of John Brown with Lucy Elizabeth Weir. Romer J. decided that none of these certified copies of the entries in the register were any evidence of the lawful marriage of John Brown and Lucy Elizabeth Weir.

It becomes necessary, therefore, to determine how far the certified copies can be received as evidence upon the question now propounded whether there was a lawful marriage between the father and mother therein named. It is necessary to look somewhat closely at certain sections of the Act of 1836. That Act followed an earlier Act of 1812 (52 Geo. 3, c. 146) which was intituled "An Act for the better regulating and preserving parish and other registers of births, baptisms, marriages and burials in England" and was avowedly passed in order to "facilitate the proof of pedigrees of persons claiming to be entitled to real or personal estates." In that Act, which had reference to parish registers, the forms given under it related to baptisms (and not to births), marriages, and burials. The Act of 1836 is an Act to supplement

the earlier Act of 1812. It provides by s. 17 that register books are to be provided for the use of the registrar, and those books are to contain certain forms which are scheduled to the Act. The first form (Sch. A) relates to and shows the births of certain persons within the district of the registrar. The second form (Sch. B) relates to deaths within that district, and the third form (Sch. C) relates to marriages. Those forms have to be filled up. Sect. 18 imposes upon the registrar the duty of informing himself carefully of every birth and every death which shall happen within his district, and to learn and register as soon after the event as conveniently may be done the particulars required to be registered. I pause there to point out that a time limit, if not a very exact one, is imposed upon the registrar, that is to say, he is to perform his duty "as soon after the event"—which must mean either the birth or the death—" as conveniently may be done." Sect. 19 provided: " That the father or mother of any child born . . . . may within forty-two days . . . . give notice of such birth or death to the registrar of the district." Sect. 20 provided that the father or mother or, in certain cases, the occupier of the house was to give information upon being requested so to do by the registrar, who was carrying out the duty imposed upon him under s. 18, and he or she was to give information to the registrar according to the best of his or her knowledge and belief. Sect. 22 provided for the case of registration after the expiration of the forty-two days' limit from the birth of the child, and a much more formal procedure was then required. Sect. 23 provided that births were not to be registered after six months. It is clear, therefore, that the question of the actual date of the birth of a child was of importance in relation to the duty which was imposed upon the registrar and the corresponding duty which was imposed on the father or mother of the child or the occupier of the house or tenement in which the birth happened to take place. Sect. 25 dealt with the registration of deaths and under that particulars were to be given, but it was provided that in the case where an inquest was held on the body " The jury shall inquire of the particulars herein required to be registered

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concerning the death, and the coroner shall inform the registrar of the finding of the jury, and the registrar shall make the entry accordingly," so that as matters stood under that Act in the case of a death information might have been given to the registrar which he had entered and he would also have supplementary information given to him by the coroner in accordance with the duty imposed upon the coroner under s. 25. Sect. 28 provided "That every person by whom the information contained in any register of birth or death under this Act shall have been given shall sign his name, description, and place of abode in the register; and no register of birth or death according to this Act shall be given in evidence which shall not be signed by some person professing to be the informant, and to be such party as is herein required to give such information to the registrar." Sect. 41 imposes penalties on persons wilfully giving false information.

The Act of 1836 is the Act which applies to the three birth certificates. The certificate of the death of Harriett Ellen Brown in 1889 is governed by the Births and Deaths Registration Act, 1874. That Act was passed to supplement the Act of 1836, and under it slightly different provisions are made. Sect. 1 imposes the duty which was not imposed by the Act of 1836 on the father and mother, or in default of the father and mother the occupier of the house in which the child is born, to give to the registrar within forty-two days after such birth information of the particulars required to be registered concerning such birth. Sect. 2 gives power to the registrar to require persons to give information within forty-two days after the birth. Sect. 7 provides that the name of the father of an illegitimate child is not to be entered in the register except at the joint request of the mother and of the person acknowledging himself to be the father of the child, and that person is in such a case to sign the register, together with the mother. Sect. 16 adds something to the system of recording the result of an inquest, because it provides that where an inquest has been held the information is to be given to the registrar, but "if the death has been

previously registered the said particulars shall be entered in the prescribed manner without any alteration of the original entry." Thus there may be in the case of a death two entries, one giving the cause of death, which is one of the items required to be stated in the certificate of death upon the information of the informant within forty-two days, and the other, the information which is the result of the finding of the coroner's inquest, and those two entries will stand in the register and no correction in the earlier entry is to be made by the registrar upon information given to him. Sect. 20, sub-s. 2, provides: "In case of the death of any person who has been attended during his last illness by a registered medical practitioner, that practitioner shall sign and give to some person required by this Act to give information concerning the death a certificate stating to the best of his knowledge and belief the cause of death, and such person shall, upon giving information concerning the death, or giving notice of the death, deliver that certificate to the registrar." Therefore steps are taken by the Act to ensure that the registrar may have what would appear at first sight to be authoritative information of the cause of death, because it is based upon the certificate of a medical practitioner who has attended the deceased person. It is perhaps worth while to call attention to the fact that as the law now stands it is necessary to give a notice of births and deaths to the medical officer pursuant to the Notification of Births (Extension) Act, 1915, which is a general Act and which makes of wide application the original adoptive Act, the Notification of Births Act, 1907, under which notification of births and deaths was to be given to the medical officer of health. The system, therefore, is now more complete than it was in 1836, when the Act that we have to consider was originally passed.

That being the state of the law under the Act of 1836 which bears upon the certificates of birth one has to consider what is the effect of s. 38 to which I have already referred, which says that copies of entries in the register "shall be received as evidence of the birth, death, or marriage to which

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the same relates." How far do they contain evidence of matters stated in them, having regard in this particular case to the fact that the form provided under the Act of 1836 requires a statement to be included of the name and surname of the father and the name and maiden surname of the mother, as well as of the date of birth.

In 1846 *Irish Society* v. *Bishop of Derry* (1) was decided by the House of Lords, who adopted a joint opinion of the judges who were summoned to advise the House. The opinion was delivered by Parke B. as senior judge, and contained the following statement (2): "In public documents, made for the information of the Crown, or all the King's subjects who may require the information they contain, the entry by a public officer is presumed to be true when it is made, and is for that reason receivable in all cases, whether the officer or his successor may be concerned in such cases or not. A marriage or burial register would certainly be admissible to prove a marriage or death, in suits to which the clergyman who made it might happen afterwards to be a party, though he had a pecuniary interest in the particular marriage or death at the time." That appears to be a wide statement that the entries by the public officer are presumed to be true, and if so it might be said that the statement of the father and of the mother appearing in the copy of the certificate must show that those persons were the father and mother of the child. Speaking for myself, I should have thought that, unless it were proved that the father and the mother were not married, the use of the words "father" and "mother" meant the legal father and the legal mother. It is to be observed that, under the Act of 1874, in the case of an illegitimate child the father's name is only in certain circumstances and upon his own signature to be entered in the register.

In 1850 there was another case of *Doe* v. *Andrews* (3), in which Erle J., in the course of the argument, said (4): "It depends upon the public duty of the person who keeps the

(1) 12 Cl. & F. 641.
(2) Ibid. 668, 669.
(3) 15 Q. B. 756.
(4) Ibid. 759.

register to make such entries in it, after satisfying himself of their truth. If he does so satisfy himself, and makes the entry, it is not open to the contesting party to exclude the evidence by shewing that he might have obtained the information on which he acted in a more businesslike manner."

It would appear, therefore, upon consideration of s. 38 and the two cases to which I have referred, that these certificates ought to be received in evidence, and that they would appear to be some evidence—I do not at all say conclusive evidence—of the facts and of the date of birth and of the date of death recorded in them; but in 1870 Lord Romilly in *In re Wintle* (1) appeared to make a somewhat different statement. It was a case in which there was a petition for the payment out of Court of a fund payable to the petitioner on his attaining twenty-one. The application was made on January 29, 1870. It was said that the date of the petitioner's birth was January 23, 1849. The date of the registration was February 13 following. The question was therefore whether or not there was evidence that on January 29 the petitioner had attained the age of twenty-one, or whether if the registration of his birth was to be taken as the date at which there was conclusive evidence of his birth the application ought to be postponed for a fortnight until February 13, which would complete the twenty-one years from the date of registration. Lord Romilly said (2): "The Act makes the entry in the register evidence of the fact of birth, and nothing more; and therefore I have always held that it is evidence only of the child having been born before the entry was made." He accordingly held that the order could not be made until the following February 13, which would complete the twenty-one years from the date of the registration. If Lord Romilly meant to say that the copy of the register could be evidence only of the fact of the birth and nothing more, it appears to me that he was running counter to the two cases and the statement of the law in the House of Lords to which I have referred. His observation, however, is stated very shortly, and not in a

(1) L. R. 9 Eq. 373. (2) Ibid. 374.

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considered judgment or apparently after very serious argument. The following remark was made on it by Swinfen Eady M.R. in *Bird* v. *Keep.* (1) "Thus Lord Romilly held that the entry was evidence of the birth having taken place before the date of registration, but not of the exact date of birth: *In re Wintle.* (2) This has been the rule acted upon in Chancery." If Lord Romilly had laid down a rule which was consistently acted upon in the Court of Chancery one would wish to pay great respect to it. But perhaps "rule" is the wrong word to use. It seems to have been a matter of practice, and comparatively unimportant—namely, whether applicants should receive their money a few days or weeks earlier or later. In my judgment that is the true perspective in which to consider the dictum of Lord Romilly in *In re Wintle* (2); otherwise it runs counter to other cases to which I must refer.

In *Wilton & Co.* v. *Phillips* (3) Phillimore J. did not follow *In re Wintle* (2), but held that the evidence derived from a certificate of the entry in a register, together with evidence of identification, was sufficient evidence of the date of birth, and he pointed out that it was the constant practice in criminal cases, under the Criminal Law Amendment Act, to accept the certificate of birth together with the evidence of some relation identifying the person named in the certificates as proof of age.

In 1904, in *In the Estate of Goodrich* (4), Jeune P., although his attention was called to *In re Wintle* (2), again did not follow it. In the course of the argument he said (5): "I am at a loss to follow Lord Romilly's decision. The section of the Act (s. 38) says that the certified copy is to be received as evidence 'of the birth'—not, as Lord Romilly says, 'of the fact of birth and nothing more.'" And in his judgment he said (6): "The case of *Reg.* v. *Weaver* (7) . . . . a criminal case in which the accused person would not have been found

(1) [1918] 2 K. B. 692, 698.
(2) L. R. 9 Eq. 373.
(3) 19 Times L. R. 390.
(4) [1904] P. 138.
(5) [1904] P. 138, 139.
(6) Ibid. 140.
(7) L. R. 2 C. C. 85.

guilty unless the law clearly supported such a conviction—appears to me conclusive to shew that the certificate is evidence of its contents, and, among its contents, is the date of the birth."

In *Brierley* v. *Brierley* (1) McCardie J., who went into the matter, again accepted the decision of Jeune P. in *In the Estate of Goodrich* (2) in preference to that of Lord Romilly in *In re Wintle.* (3) McCardie J. followed and agreed with Phillimore J. and Jeune P., and said (4): "I desire to add that neither the register nor the certificate are in any way conclusive, but only prima facie evidence of the facts to be established in a case such as the present. Evidence, however, can clearly be given to contradict them, and, in a proper case, corroboration of them may be required."

It appears to me upon those cases that the true effect of s. 38 is that the certificate is evidence of the date of the birth, although not absolute and conclusive, but still it is to be taken as—I think one may here use the words—prima facie evidence of the date of the birth, and I prefer the three decisions to which I have referred, based, as I think they are, upon the ruling of the House of Lords, to the ruling of Lord Romilly.

I must however refer again to *Bird* v. *Keep* (5), because I think it very materially affected Romer J.'s judgment. That was a case under the Workmen's Compensation Act, 1906, in which the question was whether or not the workman had died from an accident arising out of and in the course of his employment. The main question in the case was decided upon the admissibility or not of the finding of the inquest held by the coroner, but incidentally the question of the admissibility of the certificate of death and the cause of death as entered in that certificate arose. It does not appear to me, however, that the Court of Appeal definitely gave a decision which concludes the point before us. Swinfen Eady M.R., after referring to *Wilton & Co.* v. *Phillips* (6); *Brierley* v.

(1) [1918] P. 257.
(2) [1904] P. 138.
(3) L. R. 9 Eq. 373.
(4) [1918] P. 260.
(5) [1918] 2 K. B. 692.
(6) 19 Times L. R. 390.

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Brierley (1); and *In the Estate of Goodrich* (2), said (3): "Even if the entry be evidence of the exact date of the event recorded, whether birth or death, as to which I do not express any opinion, as the point has not been argued, it is not, in my opinion, evidence of the cause of death." Neville J. concurred with Swinfen Eady M.R. Bankes L.J., who gave the other judgment, said (4): "The question which was raised and decided with reference to a birth certificate in the cases of *In the Estate of Goodrich* (2); *Wilton & Co.* v. *Phillips* (5); and *Brierley* v. *Brierley* (1) had reference to the date of the event recorded in the certificate. I express no opinion upon that point." It appears to me, therefore, that it cannot be said that *Bird* v. *Keep* (6) is a binding authority upon the point that we have to decide, and I think, therefore, that we are upon this point entitled to consider the balance of authority to which I have already referred.

In my judgment these certificates are admissible in evidence upon the issue whether or not the parents of Cecilia Stollery were married. I do not say that they are prima facie evidence proving that marriage, in the sense that in the absence of a rebuttal they ought to be acted upon without more. I do not mean so to hold. In any case evidence of identification of the persons named in the certificates will be required. But it appears to me that these certificates are admissible in evidence in the inquiry. It will be a question in the inquiry, or issue, whether there is enough evidence to establish the marriage of Cecilia Stollery's parents, but I cannot think that it is right to reject the certificates as not containing any evidence, as I understand the use of that term in the question in the summons. They may well prove to be links in the chain of evidence, or corroboration strengthening other evidence presented to the Court.

The order as made by the learned judge goes too far and must be varied to the effect that the certified copies of the entries are admissible as evidence as to the lawful marriage of

(1) [1918] P. 257.
(2) [1904] P. 138.
(3) [1918] 2 K. B. 692, 698.
(4) [1918] 2 K. B. 704.
(5) 19 Times L. R. 390.
(6) [1918] 2 K. B. 692.

John Brown and Lucy Elizabeth Weir. They are admissible as evidence, but I do not say, and I repeat it, that they are anything like conclusive evidence.

Perhaps I may add that in *In re Turner* (1), in which Chitty J. had to consider whether certain entries in the baptismal register which had been made pursuant to the Act of 1812 were admissible, he held precisely in the same way as I am endeavouring to point out now, that the certificates were admissible as evidence, and indeed in that case were found to contain corroboration of facts which were available from other sources.

The appeal must therefore be allowed, and the order of Romer J. altered in the manner I have suggested.

With regard to costs, inasmuch as this point is one which it was desired should be determined in the interests of all parties the costs of this appeal will be dealt with as the costs were dealt with in the Court below.

SCRUTTON L.J. I agree in the result at which my Lord has arrived, but as we are dealing with a question of some general importance, and altering the order made in the Court below, I will express my judgment in my own words.

A lady whose name was Stollery died intestate. Her Christian name appears to vary between Cecilia Lucy and Mary Ann, and there may be other alternatives. The Crown claimed her property as on an intestacy, and administration of her personal estate was granted to the Treasury Solicitor. Two persons, Reuben John Weir and Joseph Weir, who claimed to be two of the next of kin, took out an originating summons for the administration of her estate, and an order was made for an inquiry who were her next of kin. In the course of that inquiry the plaintiffs put in, or claimed to put in, four certificates, the certificate of birth of the lady herself, the certificates of birth of her brother and sister, and the certificate of death of her sister, Harriett Ellen, and they claimed that those certificates, by the statements made in them, afforded evidence of the marriage of the father and

(1) 29 Ch. D. 985.

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mother of Mrs. Stollery, it being, of course, necessary to show a valid marriage in order to trace a legal connection between Mrs. Stollery and the married couple through whom the plaintiffs claimed. On these certificates being tendered, the question arose how far they were evidence of the statements of fact purporting to be contained in them, and on the suggestion of the Master, or by conspiracy of junior counsel, or both, it occurred to everybody concerned that the proper way to deal with this was not on all the evidence, but by a summons to determine, in the language of the summons: whether the certificates were "prima facie or any evidence of the lawful marriage of John Brown and Lucy Elizabeth Weir." I think everybody agrees, with that wisdom that comes after the event, that that is not a very satisfactory formula. If "prima facie evidence" means evidence conclusive, in the absence of any other evidence, it is agreed that these certificates could never be prima facie evidence, because on them alone you could never act unless you had evidence of the identification of the persons named in the certificates with the persons concerned in the issue which was being tried in the inquiry before the Master. The phrase "any evidence," which is the alternative branch of the summons, is ambiguous in that it is not clear whether it means evidence which by itself would establish the marriage, or evidence which, in conjunction with other evidence not before the Court, might be sufficient to establish the marriage.

The case came before Romer J. who, having had conflicting authorities cited to him, came to the conclusion—contrary, I think, to the opinion which he would have formed but for the decision of the Court of Appeal in *Bird* v. *Keep* (1), that the statement as to the cause of death in a death certificate, that statement being derived from the coroner's inquiry, was not evidence—that he could see no difference between the statement as to the cause of death and any other statement in the certificate. The learned judge came to that conclusion without having had his attention called to the fact, or without himself discovering, that there were very

(1) [1918] 2 K. B. 692.

specific statutory provisions with regard to the statement as to the cause of death which completely distinguished that particular statement from other statements in the certificate. I cannot help thinking that if the learned judge's attention had been called to those statutory provisions he would have felt himself free to act on the opinion which, up to that time, he had formed that he should follow the three later common law decisions in which it had been held that the certificates were evidence of the statements contained therein.

In view of the difference of opinion in the authorities, I think it is just as well to begin at the beginning, which is not a bad place at which to begin. The statute of 1836 recites: "Whereas it is expedient to provide the means for a complete register of the births, deaths, and marriages of His Majesty's subjects in England," the existing provisions being "insufficient for the purpose," and it is provided by s. 17 that books shall be provided by the Registrar-General containing heads of information required to be known, that is, required to be known for the public purposes mentioned in the preamble. Having got the books with the blank spaces for the information required to be known, the duty is put upon the registrar of informing himself correctly of every birth and every death and learning and registering the particulars required to be registered, and a form is given which contains room in which certain statements of facts are to be filled in. Stopping there, it seems to me that statements inserted in such a public document for such a purpose required to be known for the public service, are public documents, and that they come within the unanimous opinion of the judges in the House of Lords, adopted by the House in *Irish Society* v. *Bishop of Derry*. (1) In that case there was a contest between the Irish Society, relying on a grant from the Crown of patronage in their Irish estates, and the Bishop of Derry claiming to be patron of an advowson within those estates. A number of documents were tendered by each side as evidence of who was the patron of the advowson, and, among other documents, the Bishop of Derry's counsel tendered

(1) 12 Cl. & F. 641.

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secondary evidence of certain returns made by the Bishops of Derry in obedience to writs from the Exchequer. The question was whether those returns were properly received as evidence of the facts stated therein. The unanimous opinion of the judges delivered by Parke B. was (1): "We think the entry was properly received. The writs related to a public matter, the revenue of the Crown, and the Bishops, in making the return, discharged a public duty, and faith is given that they would perform their duty correctly: the return is therefore admissible, on the same principle on which other public documents are received. . . . . In public documents, made for the information of the Crown, or all the King's subjects who may require the information they contain, the entry by a public officer is presumed to be true when it is made, and is for that reason receivable in all cases, whether the officer or his successor be concerned in such cases or not." I may say, incidentally, that it seems to me that that judgment is the justification for Phillimore J.'s statement in *Wilton & Co.* v. *Phillips* (2), which seems rather to have startled Romer J., that "A public document coming from the proper place or a certified copy of it was sufficient proof of every particular stated in it." Phillimore J. appears to me to be simply restating the unanimous opinion of the judges in *Irish Society* v. *Bishop of Derry.* (3)

The matter does not stop there, because, as is the case in many of the statutes which create registers, there is a provision in the statute as to the admissibility of the document. That provision is varied very much in different statutes. By the Companies (Consolidation) Act, 1908, s. 17, the certificate of incorporation is made conclusive evidence of incorporation. In some of the Acts, the Merchant Shipping Act, 1894, s. 64, for instance, there is a statement that the document is to be sufficient evidence, which has been interpreted to mean sufficient by itself, but capable of contradiction by other evidence. In the Copyright Act, 1842, s. 11, there was a provision that copies of the book of registry "shall be

(1) 12 Cl. & F. 668, 669. (2) 19 Times L. R. 390.
(3) 12 Cl. & F. 641.

prima facie proof of the proprietorship or assignment of copyright or licence as therein expressed, but subject to be rebutted by other evidence."

In the Act of 1836, s. 38 provides that the "certified copies of entries . . . . shall be received as evidence of the birth, death, or marriage, to which the same relates." A difference of opinion seems to have arisen in the authorities as to how much of the document is made evidence by that section. In *In re Wintle* (1), which begins the list of authorities, Lord Romilly restricted the entry to the fact of birth, and nothing more, and therefore not the date of birth. I do not think that Lord Romilly's attention can have been called to the fact that it was the duty of the registrar to inquire into the date of birth, because he only had authority to register a birth which happened after March 1 in a particular year, and had no authority to register a birth more than forty-two days after the date of the birth, under one section, under certain conditions, or more than six months after the date of the birth, under another section, under other conditions. It must therefore have been the duty of the registrar to inquire into the date of birth. We understand from the statement of Lord Romilly—or, rather, I should say I understand, because one of my brothers knows all about it—and the statement of Swinfen Eady M.R. in *Bird* v. *Keep* (2), which has been referred to, that it has been the practice of the Chancery Division to treat the certificate only as evidence that the birth happened before the registration, going so far as to assume that you would not prophesy and register the birth of a child before that child was born; but that practice, which is of very small importance in the sense that it may only postpone a person's coming into his estate for a short time, seems never to have been tested by a case where a person died at a time when he was over twenty-one by the real date of his birth, but not twenty-one by the date of the registration, when there would probably have been sufficient money in the matter to involve a very serious consideration of whether the practice was right. I am unable

(1) L. R. 9 Eq. 373. (2) [1918] 2 K. B. 692.

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to find any justification for the exclusion of the date of the birth which is mentioned in the certificate, and which it was the judicial duty of the registrar to inquire into, because the validity of the registration and his power to register at all depended on it. *In re Wintle* (1), which is the foundation of the divergence of authority which has happened, appears to me to have been wrongly decided if it excluded the statement of the date of the birth contained in the certificate. When one looks at s. 38 it says: " . . . . shall be received as evidence of the birth . . . . to which the same relates." What is the birth to which the same relates ? It is not an abstract birth, with no father, no mother, and no date. It is the birth of a particular child to a particular mother, with a requirement to state the name of the father, and a requirement to state the date of birth. " The birth . . . . to which the same relates " appears to be the birth of which the particulars are stated which, in the language of the Act, are required to be known, and which the registrar is required to learn. Therefore I should agree with the view which was taken in the next three common law cases by Phillimore J., Jeune P. and McCardie J., that, in the absence of any special statutory provision, those particulars in the certificate which it was the statutory duty of the registrar to inquire into and learn, and state the result of his inquiry, and learning, in the certificate are admissible evidence of the facts therein stated, although subject to contradiction by other evidence.

Then there is a further matter which seems to me to be very conclusive. In no cases are the rules of evidence applied so strictly as in criminal cases. In several criminal statutes whether or not a crime has been committed depends upon the age of the child. As is stated by Phillimore J. in *Wilton & Co.* v. *Phillips* (2), and as I know from my six years' experience in the criminal Courts, it has been the constant practice to admit the certificate of birth as evidence of the date of the birth, subject to evidence identifying the particular child against whom the crime has been committed with the child

(1) L. R. 9 Eq. 373. (2) 19 Times L. R. 390.

named in the certificate. If *In re Wintle* (1) is to be carried to the extent of deciding that the certificate was not evidence of the date of birth, all the persons who have been convicted on the evidence afforded by such certificates have been wrongly convicted. The practice which has prevailed in regard to certificates in the criminal Courts is in accordance with the three common law cases which my Lord has cited, to which I do not again refer.

At this stage I think Romer J. would have said in effect that he would have followed the later authorities, and would have held that the statements in the certificates were admissible, but then in 1918 there came the decision of the Court of Appeal in *Bird* v. *Keep* (2), to which my Lord has referred. It was a workman's compensation case in which the question was whether a statement in a certificate of the cause of death purporting to be derived from the inquiry by the coroner at an inquest was admissible. The Court held that the county court judge who had decided the case had evidence outside the certificate on which he was quite justified in finding what the cause of death was, and therefore, as both the judges who delivered judgments said, it was not necessary for them to go on and decide the effect of the statement in the certificate, but both Swinfen Eady M.R. and Bankes L.J. said that as the matter had been argued they would express their opinion on it. They accordingly expressed their opinion that the statement as to the cause of death in the certificate of death derived from the coroner's inquest was not evidence in the workman's compensation case before the county court judge. Neville J. said that he did not dissent, although he did not express an opinion on the point, as the matter was not material, in view of the decision on the other point. Romer J. (on the materials before him, I think, rightly) said that he was unable to see any distinction between the statement as to the cause of death in the certificate and the statements as to the father, the mother, and the date of birth in the certificate; but the learned judge's attention does not

(1) L. R. 9 Eq. 373. (2) [1918] 2 K. B. 692.

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seem to have been called by counsel to the fact—and the learned judge himself had not enjoyed the pleasure of reading the statutes through to find out whether there was anything in them—that there were very specific provisions with regard to statements as to the cause of death derived from coroners' inquests. By s. 25 of the Act of 1836 the coroner was bound to inform the registrar of the finding of the jury, and the registrar had to make the entry accordingly, that is to say, the registrar had no judicial or public duty to inquire, but he had to take the cause of death as found by the coroner's jury. He had to make the entry, whether he agreed with it or not, and whether he thought the finding was ridiculous, or whether he thought it was right. In the Act of 1874 the matter went rather further, because there was a section (s. 16) which said that on the production of a medical certificate the registrar must enter the cause of death stated in the certificate, except where there was a coroner's inquest, and then he must enter the cause of death stated by the coroner's jury, even if he had already entered another cause of death in the certificate before he received the certificate of the inquest, so that he might be bound to enter two entirely contradictory statements as to the cause of death, one derived from his own information, or from the doctor's certificate, and the other derived from the finding of the coroner's jury. That duty of the registrar with regard to the statement as to the cause of death seems to me at once to distinguish such a statement in the certificate from the other statements which the registrar is bound to inquire into, and state the results of his personal inquiry according to his judgment. No doubt the registrar usually acts upon the information supplied by the apparently responsible person, the father, the mother, or the householder, who makes statements to him, but he is quite at liberty to reject such statements if he sees reason to believe that they are untrue, or that the person appearing before him is not really the person whom he or she purports to be. For these reasons there seems to be nothing in the decision of the Court of Appeal which would justify us in disregarding the view which

was arrived at by the common-law Courts, and which seems to me to be in accordance with principle.

As to the form of the summons, it is quite clear, as I have said, that the statement in the certificate alone is not prima facie evidence, because on that statement alone you have no evidence of identification, and therefore it is quite obvious that it is not prima facie evidence by itself. It appears to me that the statement is admissible in evidence, and what its effect is must be determined in conjunction with the other evidence which is put before the Master at the inquiry. For instance, we are told, although it is not referred to in the summons, that there is also a certificate of the marriage of the lady who is alleged to have been married to Brown, in which she describes herself as a spinster. Obviously the Master will have to take into account that statement in that certificate as well as the statements in the three certificates mentioned. It is not for me to express any opinion as to what conclusion he will arrive at, but it seems to me that each statement in the certificates is admissible in evidence. What the result of the joint evidence is will be a matter for the Master at the inquiry, and I particularly do not wish to express any opinion whether, from the statements in these certificates alone, the Master should, or should not, draw the inference of a lawful marriage. There is something to be said, and there are some authorities with regard to the matter, for the position that you may presume a lawful marriage. If I were required to express any opinion on the matter one way or the other I should desire to look much more carefully into those authorities, and into other authorities which I believe exist, than I have had an opportunity of doing in this case, and therefore I am expressing no opinion which can fetter the Master in considering whether or not he should presume that the statements that two persons of the same name are living together, and have three children, are, or are not, sufficient to establish the presumption of a lawful marriage; but the decision of the learned judge obviously went too far in holding that the certificates were not, and could not, be any evidence of a

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lawful marriage; they may be, in conjunction with other evidence, but whether they are or are not will be a question for the Master to determine at the inquiry.

SARGANT L.J. I am of the same opinion. I think that this summons was taken out with the laudable object of saving expense, but I am afraid that it has not had that result. Probably the parties thought that the only definite evidence, or the only possible evidence, of the marriage of the father and mother of the intestate consisted in the certificates in question, and they really wanted to know whether, on the faith of these certificates alone, if they are the only evidence, a lawful marriage should be presumed. But, in fact, the form of the summons goes a good deal beyond that, and there does appear to be other evidence. Therefore, in the result, the decision of the learned judge has been to exclude altogether these certificates from the materials on which the Master may arrive at the result of the inquiry before him. They are, as it were, ruled out and cancelled; they are to be disregarded altogether. I do not think that that can be correct. Looking at the Act of 1836, which of course is the foundation of the matter, the Act provides for a register of births, deaths, and marriages, and I think the Act indicates what are the particulars, and what is required to identify and define a birth. The fact that there has been a birth is, of course, of no significance at all, but if you look at Sch. A to the Act you will find what the Legislature considered were the particulars necessary to identify and segregate a particular birth from all the other births that were happening, and what was necessary to identify, by way of registration, a birth. If you look at the schedule the date of birth is considered material, the name of the child, the sex, the name and surname of the father, the name and maiden surname of the mother, the rank or profession of the father, and then the rest has to do with the person who gives the information. It seems to me that the registrar, who is bound to make inquiry, although he is by the sections of the Act entitled to act upon the information

of certain named persons without making further inquiry, is a public officer, discharging a public duty, and that, therefore, the results of his inquiry, when embodied in the register, come within the principle laid down by the judges in *Irish Society* v. *Bishop of Derry*. (1)

In this case I am not sure that I am in agreement on one point with the Master of the Rolls, and on another point with Scrutton L.J. The Master of the Rolls expressed his own individual opinion that the registration of the father and the mother in this book implied that the father and the mother were the legitimate father, and the legitimate mother, so that there was, therefore, something equivalent to a finding, or an expression of the view, of the registrar on the information before him that there had been a marriage resulting in the birth. As to that, I feel considerable doubt for this reason : At the time when the Act of 1836 was passed there was, to a greater extent than at present, a considerable and very appreciable percentage of illegitimate births. It is quite clear that the Act was making provision for the registration of illegitimate births, as well as of legitimate births, and although the form adopted in the Act is one which applies primarily to legitimate births, inasmuch as it speaks of the maiden surname of the mother, still it is a form which is intended to provide for all births, of both classes. I think, too, that under that Act there was an obligation on both the mother and the putative father, as well as the legitimate father, if requested, to give information with regard to the child, so as to enable the particulars to be registered. That seems to me to be recognized by the Act of 1874, which expressly relieves the putative father thereafter from being bound, on request, to give the information, and prevents the registrar from entering the name of the putative father unless he is requested to do so by the father and the mother. Therefore it appears to me that the mere fact that in the register the names of the father and the mother appear in printed forms which speak of the name and surname of the father, and the name and maiden surname of the

(1) 12 Cl. & F. 641.

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mother, is not of great importance, and there is no necessary implication that the father and the mother of the child registered in this form were married before the birth. On the other hand, of course, there is this circumstance to be considered in this case, that you find three births at two intervals of two years, and in each case the father and the mother are of the same description, apparently living together, and therefore it is clear, at any rate, although what force may be attached to it will be for the Master to say, in conjunction with the other circumstances, that there was a considerable permanence in the connection between the father and the mother. There was a connection lasting over four years, and there was, apparently, the fact that the mother was living under the same surname as the father. What result that may have from the point of view of reputation as indicating marriage it will be for the Master to consider.

I will not deal with the cases that have been gone into so fully by my Lord and by Scrutton L.J., because I think it is clear now that *In re Wintle* (1) is not a case which can be relied on as a general statement of the law at all. *In re Wintle* (1) really came to this. It was a decision that the Court was not prepared to order payment out to an infant a fortnight earlier than it might otherwise have done, because it appeared that his birth had been registered as of a date one fortnight earlier than the date of registration. When the only result is the postponement of the payment out of a sum of money to a petitioner the result is of little importance, and I think it is only one instance of the extreme care which the Court has always taken before paying out money in Court to a petitioner, or to a person applying by summons. Certainly as a statement of the general law that the date of the birth, under this system of registration, is to be entirely neglected, and to be no evidence at all, it must be considered to be overruled by the later cases that have been decided. I will not say anything about *Bird* v. *Keep* (2), because it has been explained by my Lords. In my judgment it is a case which rests upon the very peculiar position of the

(1) L. R. 9 Eq. 373. (2) [1918] 2 K. B. 692.

result of an inquisition before the coroner. Really, the registration in that case by the registrar is merely a short note of the result of the inquisition by the coroner, and if the inquisition held by the coroner could not itself be evidence, and that was the point that was mainly argued in the case, it would appear necessarily to result that the short note entered under statutory direction of the result of the inquisition could not itself be evidence.

With regard to s. 38, on which great stress was laid by Scrutton L.J., I by no means want to cast any doubt upon the admissibility of the evidence as entered by the registrar, having regard to the rule laid down in *Irish Society* v. *Bishop of Derry* (1), but I think perhaps the Lord Justice has attached a little too much importance to s. 38. I do not think that that section has any effect as regards the admissibility or the value of the evidence furnished by the register itself. I think the section is directed merely to one practical purpose—namely, to make the certified copy given by the registrar, and produced in Court, of equal value with the register itself if the register itself had been produced. It is a mere case of facilitating the proof of the contents of the register, and therefore I do not think that importance ought to be attached to the special words of s. 38, which say that the certificate shall be received as evidence of the births, death, or marriage, to which the same relates, without any further or other proof of such entry. That, I think, is merely a matter of convenience, and to relieve persons from the necessity of calling the registrar, and having the register produced. The certified copy is made as good evidence as the register itself.

There is one other matter that I think I might mention. It does not seem to me that every part of the entry in the register is necessarily of equal weight as evidence with every other part of the entry. The whole is admissible as evidence, but it may very well be that with regard to one part there is a greater certainty than with regard to another part. For instance, the date of registration practically must be assumed to be conclusive. On the other hand, with

(1) 12 Cl. & F. 641.

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regard to the date of the birth, there may be some mistake. The registrar is acting only on the information of other persons. With regard to the description of persons, or the place of abode, or matters of that kind, in all those cases, although the evidence is admissible as evidence, it may very well be that the weight of the evidence varies. I think that observation is of particular value when one comes to the fourth certificate in question here, the certificate of the death of one of the children of the union, Harriett Ellen Brown. In that certificate she is described as being the daughter of John Brown, a jeweller, deceased. What the Act requires to be entered, and what the registrar has to make inquiries about, is the rank or profession of the deceased. You find the statement in the register of something which is not a part of the rank or profession of the deceased—namely, that she is a daughter of John Brown, a jeweller. It seems to me that as to that, it is very doubtful whether the register or the certified copy of the register is any evidence at all, because it is something which is not inserted in the register by the official as part of his duty under the Act. The register does not make any provision for showing who are the parents of the deceased person. With those observations I leave the matter.

It appears to me that the order as it stands is wrong in entirely striking out, from the matters which the Master has to consider, these certificates. They are, in my judgment, admissible evidence, although the weight of the evidence is for him to consider, in conjunction with the other evidence laid before him at the inquiry.

Appeal allowed.

Solicitor for appellants: *F. H. Adams.*
Solicitor for respondent: *The Treasury Solicitor.*

W. I. C.

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1925

Dec. 16.

[1925. B. 5409.]

Arbitration—Acquisition of Land—Costs—Lump Sum—Discretion of Arbitrator—Acquisition of Land (Assessment of Compensation) Act, 1919 (9 & 10 *Geo.* 5, *c.* 57), *s.* 5, *sub-ss.* 1, 3, 4, 5.

The claimant was the owner of certain land with regard to the acquisition of which an arbitration was held under the provisions of the Acquisition of Land (Assessment of Compensation) Act, 1919. He claimed the sum of 17,362*l.*, and, before the hearing of the arbitration, the President of the Air Council made an unconditional offer of 10,000*l.* The sum awarded to the claimant by the official arbitrator in respect of his interest in the land and the consequential damage thereto was 11,415*l.* In dealing with the costs the arbitrator directed the Council "to pay the sum of 100*l.* towards the costs of the claimant." The claimant applied to the Court by motion for the award to be remitted to the arbitrator on the ground that he had, in making the above order as to costs, not properly exercised the discretion conferred upon him by s. 5, sub-s. 4, of the statute :—

Held, that, in awarding the lump sum of 100*l.*, the arbitrator had in terms awarded to the claimant part of his costs of the arbitration within the meaning of s. 5, and that, as it seemed reasonably clear from the statute that, when a sum was awarded by the arbitrator in excess of the amount offered by the authority but less than the sum which the claimant had offered to accept, the arbitrator had an absolute discretion as to the costs, the motion to review the award failed.

MOTION.

The following statement of facts is taken from his Lordship's judgment: This is a motion to have an award made under the Acquisition of Land (Assessment of Compensation) Act of 1919 remitted to the arbitrator in order that he may reconsider and redetermine the question of the costs of the arbitration. It appears that the Air Council served on the claimant, the person who is making this application, a notice to treat in respect of certain lands of his somewhere near Bushey Heath. The claimant estimated the value of his land to be taken at 17,362*l.*, but that sum was not agreed to by the Air Council. The matter was accordingly referred to arbitration under the provisions of the Acquisition of Land (Assessment of Compensation) Act, 1919. That Act provides by s. 1, sub-s. 1,

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as follows: "Where by or under any statute . . . . land is authorised to be acquired compulsorily by any Government department . . . . any question of disputed compensation, and, where any part of the land to be acquired is subject to a lease which comprises land not acquired, any question as to the apportionment of the rent payable under the lease, shall be referred to and determined by the arbitration of such one of a panel of official arbitrators to be appointed under this section as may be selected in accordance with the rules made by the reference committee under this section." Then sub-s. 2 provides that those arbitrators are to be persons with special knowledge of the valuation of land. Then, after providing for the way in which those arbitrators are to be appointed and the rules to be observed by those arbitrators in assessing compensation, the Act in s. 3, sub-s. 6, says: "the fees to be charged in respect of proceedings before official arbitrators shall be such as the Treasury may prescribe." Then there are these provisions with respect to costs in s. 5, sub-s. 1: "Where the acquiring authority"—in this case it is the Air Council—"has made an unconditional offer in writing of any sum as compensation to any claimant and the sum awarded by an official arbitrator to that claimant does not exceed the sum offered, the official arbitrator shall, unless for special reasons he thinks proper not to do so, order the claimant to bear his own costs and to pay the costs of the acquiring authority so far as such costs were incurred after the offer was made." Then sub-s. 3 says: "Where a claimant has made an unconditional offer in writing to accept any sum as compensation and has complied with the provisions of the last preceding sub-section"—to which it is not material to refer—"and the sum awarded is equal to or exceeds that sum, the official arbitrator shall, unless for special reasons he thinks proper not to do so, order the acquiring authority to bear their own costs and to pay the costs of the claimant so far as such costs were incurred after the offer was made." Sub-s. 4 is as follows: "Subject as aforesaid, the costs of an arbitration under this Act shall be in the discretion of the official arbitrator who may direct to and by whom and in what manner those

costs or any part thereof shall be paid, and the official arbitrator may in any case disallow the cost of counsel." Then sub-s. 5 says: "An official arbitrator may himself tax the amount of the costs ordered to be paid, or may direct in what manner they are to be taxed."

In due course the matter was referred to the arbitration of one of the official arbitrators under the Act. Before the matter came before him an unconditional offer had been made on the part of the Air Council of 10,000*l.* in satisfaction of Mr. Bradshaw's claim to compensation. No unconditional offer had been made by the claimant, although, as I have already stated, he had claimed in his notice of claim, which was sent in response to the notice to treat, a sum of 17,362*l.* In due course the arbitrator made his award, and it is in these terms: "The acquiring authority to pay to the claimant the sum of 11,415*l.* in respect of his freehold interest in the land and consequential damage thereto. The acquiring authority to erect and maintain suitable and necessary fencing. The acquiring authority to pay the costs on this award. The acquiring authority to pay the sum of 100*l.* towards the costs of the claimant."

The grounds on which the application to the Court was made by the plaintiff were: (1.) Because the arbitrator did not ask for or obtain information as to the amount of the costs incurred by the claimant in connection with the arbitration and could not therefore properly exercise his discretion as to the payment of such costs, as required by s. 5, sub-s. 4, of the Act of 1919; (2.) Because in the absence of such information as to these costs he was not in a position to consider whether he should exercise the power conferred on him by s. 5, sub-s. 5, of the Act of 1919, under which he might himself tax the amount of costs ordered to be paid, or adopt the alternative course of directing in what manner the costs were to be taxed; (3.) Because he did not direct the costs of the claimant to be taxed under the Lands Clauses Consolidation Acts in accordance with an agreement to that effect arrived at by the parties to the reference at the hearing before him; (4.) Because the arbitrator, by directing as he

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did in para. 3 of the award that the acquiring authority should pay 100*l.* towards the costs of the claimant, had not therein or elsewhere in the award given directions as to the costs of the claimant, as required by s. 5, sub-s. 4, of the Act of 1919.

Hughes K.C. and *R. C. Maxwell* for the claimant. There appears to be no justification for the award as made by the official arbitrator, seeing that the claimant was awarded substantially more than the amount offered. This legislation is very much against the subject and in favour of the acquiring authority. By s. 5, sub-ss. 4 and 5, of the Act it is provided that the costs are to be in the discretion of the official arbitrator and that he may direct how they are to be paid or taxed. He must, therefore, exercise some sort of discretion and must have some reasonable materials for the exercise of that discretion. He must also have the bill before him, if he is to tax the costs. He is not justified in merely saying that a lump sum may be paid towards them, and he has no power, without any materials upon which to exercise his discretion, to say that 100*l.* shall be paid towards the costs. That was a mere arbitrary course, and no reason is shown for punishing the claimant by taking from him what should reasonably be his costs. *Gray* v. *Lord Ashburton* (1), a decision of the House of Lords on the Agricultural Holdings Act, 1908, does not apply to this case. That was a case indicating that a plaintiff who had recovered part of his demand might be ordered to pay the costs of the opposite party, the arbitrator being, under the statute, directed, in awarding costs, to take into account the reasonableness or unreasonableness of the claim.

The arbitrator failed to deal with the costs and did not mention the total amount of the costs. As in *In re Becker, Shillan & Co. and Barry Brothers* (2) the award should, in view of his silence, be remitted to him. It is not sought to have the award set aside, but to have it remitted to the arbitrator in order that he may exercise his discretion: see

(1) [1917] A. C. 26. (2) [1921] 1 K. B. 391, 398.

In re Baxters and Midland Ry. Co. (1) and *Larrinaga & Co.* v. *Société Franco-Américaine des Phosphates de Medulla.* (2)

Merriman K.C. and *Giveen* for the Air Council. It is well to consider the nature of the statute. The Act was obviously passed for the purpose of attempting to simplify and cheapen a process which had become elaborate and expensive. It was intended that everything except questions of law should be dealt with finally by the arbitrator. It is for the claimant to show that the arbitrator acted on wrong principles in making his award. *Gray* v. *Lord Ashburton* (3) lays down the principle as to the way in which this case should be approached. Here it is contended on behalf of the claimant that an official arbitrator, who had ample experience of the procedure, had no materials before him to enable him to arrive at what was a just sum; and it is also contended that an ordinary bill of costs must be carried in first. The words "in what manner" in s. 5, sub-s. 4, may include the payment of a lump sum. It would be strange if, while he could award no costs or part of the costs, he could not award an amount based on his experience and knowledge.

Hughes K.C. in reply. Power to remit can be exercised in almost every possible case. The official arbitrator must exercise discretion on some sort of material. "In what manner" does not mean that a lump sum may be awarded, but means "how" the costs of the different issues are to be borne. The official arbitrator must tax them himself. There has been no exercise of discretion, necessarily involving his knowing what the amount of the costs is, and it is not suggested here that any question of reasonableness or unreasonableness arose necessitating the penalising of the case. It cannot be said that 100*l.* is a part of the costs until it is known what the whole amount of the costs is. The 100*l.* is a sum which has no relation to the amount of the costs.

ROMER J. [after stating the facts as above set out, continued:] The award is not couched in particularly clear

(1) (1906) 95 L. T. 20, 23. (2) (1922) 27 Com. Cas. 160, 168, 169.
(3) [1917] A. C. 26.

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language, but I have very little doubt as to its meaning. "The costs on this award" which the acquiring authority were ordered to pay are in my opinion the sum of 93*l.* 19*s.*, which represents with some small addition the fees to be charged in respect of the proceedings before the official arbitrator prescribed by the Treasury under s. 3, sub-s. 6. I am told that the award, in practice, always bears a stamp to the amount of the fees which are payable under that sub-section. That, I have no doubt, is what the arbitrator means by "the costs on this award." Clause 4 of the award which directs the acquiring authority to pay the sum of 100*l.* towards the costs of the claimant is also, in my opinion, reasonably clear. It is in effect an award that the acquiring authority shall pay the sum of 100*l.* to the claimant in respect of his costs, and that the arbitrator does not see fit to make any other order as to the costs of the claimant or of the Air Council. Pausing there, it cannot, I think, be said that the arbitrator has not purported to exercise his discretion as to the costs. He has not remained absolutely silent as to the costs, as he had in the case which was cited to me of *In re Becker, Shillan & Co. and Barry Brothers* (1), where the Divisional Court adopted the view that it would be most unsatisfactory to infer from the silence of the arbitrator that he had exercised his discretion as to costs. The arbitrator here has not been silent. He has directed the Air Council to pay to the claimant 100*l.* in respect of his costs, as I read the award.

But then it is said that the arbitrator had no discretion in the matter of the claimant's costs of the arbitration by reason of what took place before the arbitrator towards the end of the arbitration before him, and I have been supplied with a transcript of the shorthand notes of what was then said. It appears that Sir Harry Courthope-Munroe, who was appearing for Mr. Bradshaw, said this: "There is only one other question, and that is the question of costs. When you have made your award, and when after making your award you deal with the sealed offer, I should ask for the costs to

(1) [1921] 1 K. B. 391, 398.

be taxed in the ordinary way under the Lands Clauses Act. I think that is the fair way of dealing with it when that has been done," and Mr. Merriman, who appeared for the Air Council, said: "Yes, I agree." It appears to me to be perfectly obvious that what Sir Harry Courthope-Munroe was there dealing with was the method of taxation of any costs that the arbitrator might see fit to award to one side or the other. Of course at this time the sealed offer had not been opened, nor had the arbitrator arrived at any conclusion as to the amount of his award. Therefore it was quite uncertain whether the Air Council would be ordered to pay any costs at all. It appears to me that the two learned counsel were merely agreeing that any costs that might subsequently be awarded by the arbitrator were not to be taxed by him under the Act of 1919, but were to be taxed under the Lands Clauses Act. It is true that Sir Harry Courthope-Munroe then went on as follows: "This is not a case where people are out to cut one another's throats. If we fail, we fail, and if we win I should ask you to allow us costs in the ordinary way"; but neither the arbitrator nor Mr. Merriman dealt further with the matter, and I can find no agreement that if the amount awarded to the claimant should turn out to be in excess of the 10,000*l.* unconditionally offered by the Air Council he was to have the whole of his costs of the arbitration paid to him by the Air Council.

It is said in the next place that the arbitrator could not properly exercise his discretion by awarding a lump sum in respect of costs. Now, if the arbitrator, while awarding to the claimant more than the 10,000*l.* offered by the Air Council, had in the bona fide exercise of his discretion directed that in the circumstances Mr. Bradshaw should be deprived of his costs of arbitrating, or should even pay the Air Council's costs of the arbitration, I could not interfere. As was pointed out in the case to which my attention was called, of *Gray* v. *Lord Ashburton* (1), a case dealing with the Agricultural Holdings Act, where the Legislature confers upon an arbitrator a discretion enabling him to decide how the costs of proceedings

(1) [1917] A. C. 26.

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before him are to be borne, the Legislature is to be taken to mean what it says. In the words of Lord Shaw, you must not import into the Act for the purpose of restricting or limiting its terms, rules derived from the common law of England, or from the practice of the Superior Court, with reference to the discretion vested in judges. Although that was said in respect of the Agricultural Holdings Act of 1908, the observations of Lord Shaw, and indeed the whole of the decision of the House of Lords, seem to me to apply almost a fortiori to the Act with which I am dealing; because the Act in terms draws a distinction between the discretion of the arbitrator in cases where he awards a sum not exceeding the amount unconditionally offered by the authority or not being less than the sum unconditionally offered by the claimant, and his discretion in all other cases. In the present case the award was of a sum in excess of the amount unconditionally offered by the authority. It was, on the other hand, considerably less than the amount originally claimed on behalf of Mr. Bradshaw. In these circumstances the arbitrator, in my opinion, had an absolute discretion as to the costs, unfettered by any of the rules, written or unwritten, which govern judges of the High Court in exercising the discretion as to costs which is imposed on them. If, therefore, the arbitrator here had directed that in the circumstances there should be no costs of the arbitration I do not see how the Court could have interfered. If, then, the Court can interfere, because instead of giving him no costs the arbitrator has given him 100*l.* in respect of his costs, it must be either because there is something in the Act that disentitles an arbitrator to award a lump sum in respect of costs, or else that, in awarding a lump sum in the present case, the arbitrator has done so without having proper materials before him on which he could fix the sum to be awarded.

It is said that, having regard to the words of s. 5, sub-s. 4, an arbitrator can only direct "to and by whom and in what manner" the costs of an arbitration "or any part thereof shall be paid," and that the words "or any part thereof" mean either an aliquot part thereof or mean the costs relating to some particular part of the proceedings before the arbitrator.

I do not feel justified in putting that restricted meaning upon the section. I think that, in awarding 100*l.* to the claimant in respect of his costs, the arbitrator has within the language of the Act awarded to him part of his costs of the arbitration.

It is said that I ought not to arrive at that conclusion, because by s. 5, sub-s. 5, it is provided that "An official arbitrator may himself tax the amount of costs ordered to be paid, or may direct in what manner they are to be taxed," the claimant contending that that is an indication that the arbitrator can only award costs which are capable of being taxed. In my opinion that is not the meaning of the sub-section. I think that the sub-section was only intended to refer to cases where costs have to be taxed, and merely indicated the manner in which the costs in that event should be taxed. It seems to me, therefore, that an arbitrator under this Act has a discretion to award to either party a lump sum in respect of, that is to say as part of, his costs, leaving the party himself to bear the remainder of his costs.

Then it is said that he had no material before him on which he could exercise his discretion inasmuch as he did not know the amount of the costs which had been incurred by the claimant. But in all these cases, where the arbitrator has to exercise his discretion as to the way in which the costs of the arbitration proceedings are to be borne, he is necessarily ignorant of the exact amount of the costs on either side. An arbitrator may direct one party to pay the costs of the other party without in the least knowing the exact amount of those costs, and if he does so his award cannot be interfered with merely upon that ground. On the other hand, it is reasonably obvious that an arbitrator under the Act is a person who must have a fairly shrewd idea as to the sort of sum to which the costs on either side will come. The arbitration proceedings take place before him, and indeed, as already pointed out, he may himself tax the costs when the bills are delivered. He is therefore treated by the Legislature as being a judge of the amount of the costs which ought reasonably to be incurred in connection with the proceedings before him. The arbitrator in the present case must have had a fairly shrewd

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idea as to what the costs of the claimant would amount to, and in those circumstances it seems to me that it is impossible to say that he did not have sufficient materials before him to enable him to arrive at the conclusion that in the circumstances it was fair and just that instead of the claimant getting his full costs he should receive 100*l.* in respect of them.

The motion to remit the award fails and must be dismissed.

Solicitors: *Holloway, Blount & Duke; The Treasury Solicitor.*

J. L. D.

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GOLD FIELDS AMERICAN DEVELOPMENT COMPANY, LIMITED *v.* CONSOLIDATED GOLD FIELDS OF SOUTH AFRICA, LIMITED.

[1924. G. 1648.]

Income Tax—Dominion Income Tax—Relief from United Kingdom Income Tax—Shareholder in Company holding Shares in Company obtaining Relief—Passing on the Relief—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *All Schedules Rules, r.* 20—*Finance Act,* 1920 (10 *&* 11 *Geo.* 5, *c.* 18), *s.* 27.

A company which has income tax deducted from dividends paid to it at a reduced rate as the result of the operation of s. 27, sub-s. 5, of the Finance Act, 1920, is itself within the operation of that sub-section when deducting income tax from its own dividends under the All Schedules Rules, r. 20, of the Income Tax Act, 1918, and must pass on the relief given under s. 27 in respect of a payment of Dominion income tax.

Even when the company's dividends are paid to it free of income tax, this will not affect the position, for the company must be treated as receiving a larger gross dividend from which income tax at the reduced rate has been deducted.

WITNESS ACTION.

The plaintiffs were a limited company and the holders of a large block of 6 per cent. second preference shares of 1*l.* each in the defendant company, another limited company. The defendants were in their turn holders by themselves or their nominees of all the shares of another limited company

called the New Consolidated Gold Fields, Ld. (herein called the "New Company"), and derived practically the whole of their income from dividends on their shares in the New Company.

The further facts, as set out in paras. 4 to 12 of an agreed statement of facts, are as follows :—

"(4.) During each of the income tax years, 1920–1921, 1921–1922, 1922–1923, 1923–1924, the New Company held and received dividends on shares of the following descriptions : (A) Shares in Dominion companies registered in the Dominion the dividends on which were paid in the Dominion. (B) Shares in Dominion companies registered in the Dominion the dividends on which were paid in the United Kingdom. (C) Shares in companies registered in England which obtained direct relief under s. 27, sub-s. 1, of the Finance Act, 1920, from a payment of the full rate of United Kingdom income tax on their profits by reason of the fact that such companies had paid or were liable to pay United Kingdom income tax on some part of their income, and had paid Dominion income tax for the same year on the same part of their income. (D) Shares in companies registered in England which (inter alia) received dividends from other companies where the latter obtain relief from the full rate of United Kingdom income tax, and in accordance with sub-s. 5 of s. 27 of the Finance Act, 1920, deduct from such dividends United Kingdom tax at a reduced rate. (E) Shares in companies as to which no question of Dominion income tax arose.

(5.) In respect of the income tax years 1920–1921, 1921–1922, 1922–1923, the New Company were not liable to be and were not assessed to United Kingdom tax under Sch. D, Case I.

(6.) In respect of the income tax year 1923–1924 the New Company were assessed to United Kingdom income tax under Sch. D, Case I., upon the average of the profits of their trade for the three preceding years, excluding from computation the dividends mentioned in para. 4, sub-paras. (B), (C), (D), and (E).

(7.) In each of the income tax years 1920–1921, 1921–1922,

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1922–1923, and 1923–1924, the New Company received dividends on shares classed in para. 4 as (B), (C), and (D). These were liable to United Kingdon income tax by deduction, but United Kingdom income tax was not deducted at the full rate. In the case of the shares classed as (B) the lower rate of United Kingdom tax deducted was arrived at by a calculation of a deduction in respect of Dominion income tax in relation to its incidence on the particular dividend. Some of these dividends were declared and paid at a rate free of Dominion income tax. In such cases for purposes of calculating the amount of dividend liable to United Kingdom income tax the amount was taken to be the actual rate of dividend paid plus an addition of an amount of Dominion income tax. In the case of dividends on shares classed as (C) and (D) the amount of deduction was arrived at by calculating the average rate of United Kingdom income tax borne by the said companies during the dividend period and deducting income tax at such rate and not at the full United Kingdom rate. Those deductions were made in accordance with the practice sanctioned by the Inland Revenue authorities.

(8.) In consequence of the fact that income tax was not deducted at the full United Kingdom rate but at a rate reduced by reason of the aforesaid allowances in respect of Dominion income tax the New Company in each of such years received in cash a larger amount by way of dividend than if deduction had been made at the full rate. The additional amounts received during such years respectively were: 1920–1921, 3433*l.* 18*s.* 5*d.*; 1921–1922, 2292*l.* 3*s.* 6*d.*; 1922–1923, 2207*l.* 17*s.* 10*d.*; 1923–1924, 4065*l.* 14*s.* 7*d.*

(9.) In respect of the income tax year 1923–1924, for which the New Company were assessed under Sch. D, Case I., and also bore Dominion income tax, the New Company made a claim to the Commissioners for the Special Purposes of the Income Tax Acts for relief from United Kingdom tax, and were allowed relief to the extent of 2*s.* 3*d.* in the £ on an assessment of 7321*l.*, such relief amounting to 823*l.* 10*s.* . . . .

(10.) The New Company during each of the years 1920–1921,

1921–1922, 1922–1923, and 1923–1924, were liable to income tax under Sch. A, and also in respect of other income not concerned with or affected by Dominion income tax."

From para. 11 it appeared that as a result of the fact that on that portion of its income mentioned in para. 7, United Kingdom income tax at the full rate was not deducted, and of the relief mentioned in para. 9 the average rate of income tax suffered by the New Company during the material income tax years were at reduced rates, which were then set out.

The next material part of the agreed statement was para. 15 :—

"(15.) The New Company in November, 1920, declared and paid to the defendants in respect of the year ending June 30, 1920, a dividend at the rate of 6 per cent. free of income tax. The New Company paid no dividend in respect of the year ending June, 1921. The New Company in November, 1922, declared and paid to the defendants a dividend in respect of the year ending June 30, 1922, at the rate of $1\frac{1}{2}$ per cent. free of income tax and on account of the year ending June 30, 1923, at the rate of 2 per cent. free of income tax. The New Company in November, 1923, declared and paid to the defendants a final dividend in respect of the year ending June 30, 1923, at the rate of 3 per cent. free of income tax, and in January, 1924, declared and paid to the defendants on account of the year ending June 30, 1924, a dividend at the rate of 2 per cent. free of income tax."

The facts as to payment of dividends by the defendants on the preference shares held by the plaintiffs were stated in paras. 18 and 19 :—

"(18.) The defendants have declared a dividend at the said rate of 6 per cent. per annum upon the said 6 per cent. second preference shares in respect of each of the half-yearly periods ending on September 30 and March 31 in each year from 1921 to 1924 inclusive, from that ending on September 30, 1921, up to that ending on March 31, 1924.

(19.) In paying the said dividends the defendants have since and including the dividend payable in respect of the

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period ending September 30, 1921, deducted income tax at the full rate of United Kingdom income tax."

The further material facts are stated in para. 22 :—

"(22.) The plaintiffs made a loss in respect of their financial year ending January 31, 1923, and claimed under s. 34 of the Income Tax Act, 1918, to recover tax suffered to the extent of the loss. The Inland Revenue authorities admitted that tax suffered by the plaintiffs during the income tax year 1922–1923 was recoverable to the extent of the loss made in the plaintiffs' financial year ending January 31, 1923, and a claim was accordingly made by the plaintiffs for the recovery of tax suffered by the plaintiffs from dividends received by them. These dividends included the dividends on the above-mentioned second preference shares in the defendant company as follows : for the half-year to March 31, 1922, paid October, 1922 ; for the half-year to September 30, 1922, paid November, 1922 ; for the half-year to March 31, 1923, paid on April 1, 1923, in respect of which tax has been deducted at the rate of 6*s.*, 5*s.*, and 5*s.* respectively. The Inland Revenue authorities declined to repay the full amount deducted on the ground that the defendant company had received relief from United Kingdom tax in respect of Dominion tax, and in accordance with s. 27, sub-s. 5, of the Finance Act, 1920, should have deducted tax from the said dividends at a rate as reduced by relief in respect of Dominion tax."

As a result of the view expressed by the Inland Revenue authorities this action was brought for a declaration that in respect of the payments of dividend on the preference shares held by the plaintiffs "the defendants have wrongfully deducted therefrom income tax at a rate exceeding the rate of United Kingdom income tax as reduced by relief from that tax given in respect of Dominion income tax," and for consequential relief.

Clauson K.C. and *Giveen* for the plaintiffs. The New Company must be treated as having passed on to the defendant company the relief in respect of United Kingdom income tax received by reason of its having paid, directly or indirectly,

Dominion income tax. That is in accordance with s. 27, sub-s. 5, of the Finance Act, 1920. The fact that the New Company pays dividends to the defendant company, free of tax, does not affect the position. The defendant company must be regarded as having received by way of dividend such an amount as after deduction of income tax at the reduced rate is equal to the sum actually paid to it: *Ashton Gas Co.* v. *Attorney-General* (1); *Brooke* v. *Inland Revenue Commissioners.* (2) A company is entitled to deduct income tax in paying dividends by virtue of the All Schedules Rules, r. 20, of the Income Tax Act, 1918.

If so, s. 27, sub-s. 5, applies when the defendant company comes to pay dividends, and it is not entitled to deduct income tax at the full United Kingdom rate, but only at the reduced rate.

Latter K.C. and *C. L. King* for the defendant company. Relief is obtained under s. 27, sub-s. 1, of the Finance Act, 1920, in respect of the payment by a company of Dominion income tax. The defendant company has never paid Dominion income tax, but the New Company has, by virtue of s. 27, sub-s. 5, to pass on to the defendant company as shareholder in the New Company the benefit of the relief given to the New Company. That exhausts the effect of s. 27, sub-s. 5, and the defendant company in paying dividends must deduct income tax on the full United Kingdom rate. The test whether a company deducts income tax is not whether it has itself paid that tax to the Crown. The company pays tax on its profits on a three year average, but in deducting tax does not take this into account. The question in this case does not concern the Revenue authorities, but is simply a question between the plaintiff and defendant companies.

The original relief in respect of Dominion income tax was given by the Finance Act, 1916, s. 43, which is reproduced in s. 55 of the Income Tax Act, 1918. That section is in substance identical with s. 27, sub-s. 1, of the Finance Act, 1920. It was decided under the old section that as the preference shareholder of a company paying Dominion income

(1) [1906] A. C. 10. (2) [1918] 1 K. B. 257, 270.

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tax, never himself contributed towards the payment of Dominion income tax, a burden which fell entirely on the ordinary shareholders, he was not entitled to any relief, but must submit to have income tax deducted at the full United Kingdom rate : *Scottish Union and National Insurance Co.* v. *New Zealand and Australian Land Co.* (1), overruling the decision to the contrary of Astbury J. in *Rover* v. *South African Breweries.* (2) Applying that decision to s. 27, sub-s. 1, of the Finance Act, 1920, the only person entitled to relief under s. 27, sub-s. 1, is the person who has paid the double tax.

It remains to consider whether s. 27, sub-s. 5, applies. That sub-section, on its true construction, only passes on the relief obtained under s. 27, sub-s. 1, by a company paying Dominion income tax to its shareholders. It provides that income tax is not to be deducted from the dividends at a rate exceeding the rate of the United Kingdom income tax, " as reduced by any relief from that tax given under this section in respect of any payment of Dominion income tax." The words " in respect of any payment of Dominion income tax," make this clear. The relief is to be given by the company paying Dominion income tax. The defendant company has never itself paid Dominion income tax ; and the most that can be said is that it has obtained relief under sub-s. 5. It is to be observed that there is nothing in s. 27 to relieve the defendant company from liability to tax at full rate. It receives the benefit of the relief under s. 27, sub-s. 5, but may still be accountable to the Revenue for the difference between the tax on the dividends it received for the New Company at the full United Kingdom rate and the reduced rate. But whether that be so, the plaintiff company fails, on the true construction of s. 27, sub-s. 5, to bring itself within the sub-section, and income tax was therefore properly deducted at the full rate upon dividends paid to it.

Again the New Company paid dividends to the defendant company free of tax, and by doing so the New Company has failed to hand on the benefit of the relief. The company

(1) [1921] 1 A. C. 172. (2) [1918] 2 Ch. 233.

having paid tax has chosen not to exercise its right to deduct tax. It is not the agent of its shareholders for the payment of tax, and though it has the right to deduct the tax under the Income Tax Act, 1918, All Schedules Rules, r. 20 (formerly s. 54 of the Income Tax Act, 1842), it need not do so: *Ashton Gas Co.* v. *Attorney-General* (1); *Purdie* v. *Rex.* (2) It follows that the defendant company never received relief under s. 27, sub-s. 5, and for this reason also tax was properly deducted at the full rate in paying dividends to the plaintiff company. The only preceding decision on s. 27, sub-s. 5, of the Finance Act, 1920, is *Sheldrick* v. *South African Breweries* (3), and it leaves the present question untouched.

Clauson K.C. in reply. There is no reason for limiting the application of s. 27, sub-s. 5, to the payments of dividends by a company, which has itself paid Dominion income tax and obtained relief in respect of it under sub-s. 1. Sect. 27, sub-s. 5, provides for the passing on of the relief from tax "given under this section." That is wide enough to cover the passing on of relief received under sub-s. 5 itself. This sub-section should be given full effect to and no limitation should be read into it that is not a necessary result of the language used in it: *Sheldrick* v. *South African Breweries.* (3) The construction contended for by the plaintiffs will work fairly all along the line and pass on this relief to the proper persons. Further, the payment of dividends to the defendant company free of tax is immaterial. The New Company must be treated as having paid a dividend at such a rate as after deduction of income tax at the reduced rate amounts to the rate of dividend paid free of tax. The defendant company has therefore received the relief and must pass it on.

Cur. adv. vult.

Jan. 26. TOMLIN J. delivered the following written judgment: The plaintiffs are a limited company, holding at

(1) [1904] 2 Ch. 621; [1906] A. C. 10.
(2) [1914] 3 K. B. 112, 116.
(3) [1923] 1 K. B. 173.

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all material times a large block of 1*l.* 6 per cent. second preference shares in the defendants, another limited company.

During the income tax years 1921–1922, 1922–1923 and 1923–1924, the plaintiffs became entitled to dividends on the preference shares so held by them, and the defendants paid such dividends, deducting tax at the full United Kingdom standard rate.

The question is whether, in the circumstances hereinafter stated, such deduction was justified, or whether, having regard to s. 27, sub-s. 5, of the Finance Act, 1920, the defendants were precluded from deducting tax at the full rate.

The facts are, shortly, as follows. The defendants, at the relevant times, held by themselves, or their nominees, all the shares of the New Consolidated Goldfields, Ld., a limited company (which I will call the "New Company"), and derived the whole, or practically the whole, of their income from dividends on their shareholding in the New Company. The financial year of the New Company ends on June 30. [His Lordship then read the material parts of the agreed statement of facts and continued :] Relief in respect of Dominion income tax was first afforded by s. 43 of the Finance Act, 1916. That section was ultimately reproduced substantially without alteration by s. 55 of the Income Tax Act, 1918. The last mentioned section reads as follows : " (1.) If any person who has paid, by deduction or otherwise, United Kingdom income tax for any year of assessment as respects which this section is continued in force by any Act, on any part of his income, at a rate exceeding three shillings and sixpence, proves to the satisfaction of the Special Commissioners that he has also paid any Colonial income tax in respect of the same part of his income, he shall be entitled to repayment of a part of the United Kingdom income tax paid by him, equal to the difference between the amount so paid and the amount he would have paid if the tax had been charged at the rate of three shillings and sixpence, or, if that difference exceeds the amount of tax on that part of his income at the rate of the Colonial income tax, equal to that

amount." Sub-s. 2 says: "In this section the expression 'United Kingdom income tax' means income tax chargeable in accordance with the provisions of this Act; and the expression 'Colonial income tax' means income tax charged under any law in force in any British possession, or any tax so charged which appears to the Special Commissioners to correspond to United Kingdom income tax."

Rule 20 of the General Rules under Schs. A, B, C, D and E of the Income Tax Act, 1918, taking the place of s. 54 of the Income Tax Act, 1842, provides as follows: "The profits or gains to be charged on any body of persons shall be computed in accordance with the provisions of this Act on the full amount of the same before any dividend thereof is made in respect of any share, right, or title thereto, and the body of persons paying such dividend shall be entitled to deduct the tax appropriate thereto." There is a difference of phraseology between s. 54 and r. 20. Sect. 54 uses the expression "a proportionate deduction in the duty so charged," while r. 20 says "the tax appropriate thereto" (that is, to the dividend).

In *Scottish Union and National Insurance Co.* v. *New Zealand and Australian Land Co.* (1), a case governed by the law as it stood before the passing of the Income Tax Act, 1918, and decided before the passing of the Finance Act, 1920, the House of Lords held that a company paying a dividend for the then current year on its preference stock was entitled to deduct from that dividend United Kingdom income tax, and was not bound to deduct at the net rate to be ascertained by taking into account the amount of the tax recovered by the company upon an application by them for relief under s. 43 of the Finance Act, 1916. This decision, affirming the decision below of the Scottish Court, overruled *Rover* v. *South African Breweries* (2), in which Astbury J. had taken a different view. In the course of his speech Lord Haldane said: "The answer to this question depends on the language of the section. It will be observed

(1) [1921] 1 A. C. 172, 178, 181, 184. (2) [1918] 2 Ch. 233.

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that the words used confer a right to claim only on a person who can show that he has paid Colonial income tax on the part of his income on which he is taxed in the United Kingdom. Speaking for myself, I am wholly unable to understand how the appellants can be truly said themselves to have paid Colonial income tax on their preference dividends. They have received these dividends in full. No doubt the respondent company paid Colonial income tax on the profits out of the residue of which the preference dividends have been paid. But that did not diminish the income of the appellants. They neither paid the tax themselves nor were indirectly subjected to it in any way. It is the ordinary shareholders alone who have lost by it, and in a question between the various bodies of shareholders and the respondent company as to how the latter, who actually paid the tax, are to account for the amount allowed them over here for having paid it, I think that as against the ordinary shareholders the appellants have no title. Neither under the language of s. 43, nor indirectly, does it seem to me possible for them to substantiate a claim based on the words employed by the Legislature. The appellants as preference shareholders are outside the legislative jurisdiction of the Dominions, and are not taxed there. It is true that profits carried by the respondent company are within that jurisdiction, and are taxed. But the only income to which the appellants are entitled in respect of their preference shares has been left undiminished. It is taxed here only. So is taxed here the income of the respondent company out of which it is derived. But under the machinery of the Income Tax Acts the amount of the tax is exacted only once. The appellants have to bear the ultimate burden of the 5*s*., and they can claim no allowance under s. 43, because they have paid nothing, either directly or indirectly in respect of which they can claim. Some one else paid, and that other person, the respondent corporation, has kept the appellants clear of all deduction from their income on that account. My Lords, the opinion which I have thus expressed is not consistent with the conclusion arrived at

by Astbury J. in *Rover* v. *South African Breweries*. (1) But after giving attentive consideration to the reasoning of the learned judge in that case, I am unable to satisfy myself with his construction of s. 43, or to follow him in his conclusion." Then Lord Finlay says: "The terms of s. 43 appear to me to be decisive against this claim. The person, and the only person, who can claim the repayment under that section is defined by the initial words of the section: 'If any person who has paid, by deduction or otherwise, United Kingdom income tax for the current income tax year on any part of his income proves to the satisfaction of the Special Commissioners that he has also paid any Colonial income tax in respect of the same part of his income, he shall be entitled to repayment', etc. It is the company, and the company alone, who fulfil this requirement. It is the company who paid the Colonial tax and the United Kingdom tax. The preference stockholders have paid by deduction the United Kingdom tax, but they did not pay the Colonial tax. The Colonial tax was paid by the company, and by it only. It cannot be contended that in paying the Colonial tax the company acted as agents for the preference stockholders. The Colonial income tax had to be paid in the colony and the profits could not be remitted to the United Kingdom without paying it. It stands exactly on the same footing with any expenses necessarily incurred in the business of the company in the Colonies. The company, in the conduct of its business, acts as a legal person, as a corporation. The different classes of holders of stocks and shares are entitled to share in the profits in terms of the articles, but the company carries on its business itself as the principal. As such, it has paid the Colonial taxes and the United Kingdom income tax, and it is the only person entitled to claim and to receive from the Commissioners the repayment provided for by section 43." Again Lord Cave says: "It was pointed out in the course of the argument that such a construction of the statute would lead to results which cannot possibly have been intended. The purpose of s. 43 is to

(1) [1918] 2 Ch. 233.

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give some relief to the taxpayer who has paid both British and Colonial income tax upon the same income. Here the double tax has been borne by the ordinary shareholders, and no part of it has fallen upon the preference shareholders; and yet it is said that the latter and not the former are entitled to the benefit of the relief. If that were so, the whole purpose of the statute would be frustrated, and the ordinary shareholders would still bear the whole burden of the double tax while the preference shareholders would be relieved (at least temporarily) of a part of the single tax which they have borne."

The view of the House of Lords on the statute law as it then stood seems to have been that the company did not pay Dominion income tax, or get relief in respect of it as agent for, or on behalf of, the shareholders generally, and that Dominion income tax, being no other than an expense incurred by the company in the conduct of its Dominion business, could only be properly treated, like any other expense incurred in earning profits, as diminishing pro tanto the company's profits available for distribution as dividend.

At all material times, so far as the action is concerned, the Income Tax Act, 1918, has been in force, together with s. 27 of the Finance Act, 1920, upon which the question for my decision arises. That section contains what was described by Warrington L.J. in *Sheldrick* v. *South African Breweries* (1), as a complete code, so far as the intentions of the Legislature then went, for regulating the way in which relief should be given against payment of double income tax—namely, the Dominion income tax and the United Kingdom income tax. Sub-s. 1 provides as follows: "If any person who has paid, by deduction or otherwise, or is liable to pay, United Kingdom income tax for any year of assessment on any part of his income proves to the satisfaction of the Special Commissioners that he has paid Dominion income tax for that year in respect of the same part of his income, he shall be entitled to relief from the United Kingdom income tax paid or payable by him on that part of his income at a rate

(1) [1923] 1 K. B. 173, 187.

thereon to be determined as follows." After providing with regard to the rate the sub-section continues: "For the purposes of this section, the expression 'the appropriate rate of United Kingdom tax' means the rate at which the claimant for the year to which the claim relates has borne or is liable to bear United Kingdom income tax, and where the claimant is liable to United Kingdom super tax the expression 'the appropriate rate of United Kingdom tax' means a rate equal to the sum of the rates at which he has borne or is liable to bear United Kingdom income tax and super tax respectively for that year." Sub-ss. 2 and 3 contain ancillary provisions which I need not read. Sub-s. 4 provides that in estimating the income Dominion income tax is not to be deducted, but is to be added. Then sub-s. 5, which is the material sub-section, reads as follows: "Where under rule 20 of the General Rules applicable to Schedules A, B, C, D, and E, a body of persons is entitled to deduct income tax from any dividends, tax shall not in any case be deducted at a rate exceeding the rate of the United Kingdom income tax as reduced by any relief from that tax given under this section in respect of any payment of Dominion income tax." The remaining sub-ss. 6 and 7 are not material to be read. Sub-s. 8 contains definitions. It defines "Dominion" as meaning: "Any British possession, or any territory which is under His Majesty's protection or in respect of which a mandate is being exercised." "The expressions 'United Kingdom income tax' and 'United Kingdom super tax' mean respectively income tax and super tax chargeable in accordance with the provisions of the Income Tax Acts." "The expression 'Dominion income tax' means any income tax or super tax charged under any law in force in any Dominion, if that tax appears to the Special Commissioners to correspond with United Kingdom income tax or super tax." "The expression 'Dominion rate of tax' means the rate determined by dividing the amount of the Dominion income tax paid for the year by the amount of the income in respect of which the Dominion income tax is charged for that year," with certain exceptions which I need not read. Then there

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is a provision as to the mode of ascertaining the rate of United Kingdom income tax.

The question in this case does not affect the amount of tax payable to the Inland Revenue authorities, but only the rights of the parties in respect of the tax which has been paid. The point is as follows: The plaintiffs say that inasmuch as in the dividends paid by the New Company to the defendants, the defendants get the benefit of the relief obtained, directly or indirectly, by the New Company under s. 27, the defendants in deducting tax from the dividends which they pay, are bound to pass on that benefit to their shareholders. The defendants, on the other hand, say: First, that sub-s. 5 only applies where the company distributing dividend has itself got direct relief under the section as a person who has himself paid Dominion income tax, and that as the defendants never themselves paid any Dominion income tax, or got any direct relief in respect of it, they were free to deduct from their dividends United Kingdom income tax at the full standard rate; and, secondly, that as the dividends paid to the defendants by the New Company were paid free of tax there was never any deduction of tax, as the result of which it could be said that even indirectly the defendant company had had income tax reduced by relief, under s. 27 of the Finance Act, 1920.

It has been held by the Court of Appeal, in the case of *Sheldrick* v. *South African Breweries* (1), to which I have already referred, that for the purposes of the sub-section, there is no distinction between preference shareholders and ordinary shareholders, and in that case the view was expressed that the object of the sub-section was, in respect of Dominion income tax, to bring the law into accord with the view expressed by Astbury J. in *Rover* v. *South African Breweries* (2), before the decision of the House of Lords in the *Scottish Union and National Insurance Co.* v. *New Zealand and Australian Land Co.* (3) Lord Sterndale M.R. says: "We have had given to us by learned counsel for the

(1) [1923] 1 K. B. 173, 184, 192. (2) [1918] 2 Ch. 233.
(3) [1921] 1 A. C. 172.

respondent company a good many reasons why the Legislature should have confined this limitation upon the power of deduction to the case where the shareholder, from whose dividend the amount is being deducted, is in the position I have mentioned of having paid double income tax himself. That is for the Legislature. I do not think we ought to consider any such matters at all. We have to look at the sub-section and see what it means. If it be ambiguous, perhaps it is legitimate to look at the history of the legislation and the object of that legislation. If the words be clear and unambiguous, as I think these words are, then I do not think that we ought to look at either the history of the legislation or what we think ought to have been the legislation; we have only to look and see what the legislation is. Therefore I base my judgment entirely upon the reading of the sub-section, apart from any considerations of its history or anything else. But it is certainly somewhat striking, when you come to consider the meaning of the words used in the sub-section, to see what the law was at the time the sub-section came into force; I do not say at the time the sub-section was first thought of, or first came under consideration. There had been a decision of Astbury J. in *Rover* v. *South African Breweries* (1), of which the headnote, which accurately, I think, states the effect of the judgment, is this: 'An English company that, owing to its having paid Colonial income tax, has obtained a rebate or repayment of 1*s.* 6*d.* in the pound on its British income tax under the Finance Act, 1916, s. 43, cannot deduct full British income tax from its dividends under the Income Tax Act, 1842, s. 54, but can only deduct the net British income tax it has actually borne.' At that time when that decision was given sub-s. 5 was not in existence. That decision was held to be wrong by the House of Lords in *Scottish Union and National Insurance Co.* v. *New Zealand and Australian Land Co.* (2), and the latter part of the headnote in that case, which again I think is accurate, is this: 'The company was not bound or entitled to deduct at the net

(1) [1918] 2 Ch. 233. (2) [1921] 1 A. C. 172.

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rate to be ascertained by taking into account the amount of the tax repaid to the company under s. 43 of the Finance Act, 1916.' If you omit the word 'not' in that headnote, which states the opinion of the House of Lords in that case, you have sub-s. 5 almost in terms: 'The company was bound and entitled to deduct the net rate to be ascertained by taking into account the amount of the tax repaid to the company under s. 43 of the Finance Act, 1916.' I think that is a rather striking circumstance, but I do not base my decision upon it. I base it upon the plain words of the sub-section, which I think are not equivocal and which, if they do not convey the intention of the Legislature, should be altered by the Legislature so as to express what it did intend." Younger L.J. says: "A different view of the law as it then stood was taken however by the Scottish Courts in *New Zealand and Australian Land Co.* v. *Scottish Union and National Insurance Co.* (1), and that view was ultimately affirmed by the House of Lords on appeal in a judgment delivered a few days before the Finance Act of 1920 became law. The view of the House of Lords on the statute law as it then stood was that Dominion income tax, being no other than an expense incurred by a company in the conduct of its Dominion business, that tax, like any other similar expense, could only properly be treated as diminishing pro tanto the company's profit fund otherwise divisible. Accordingly the only proper way of treating any remission of British income tax in respect of that Dominion payment was in view of the House to apply the amount of it in the recoupment so far as it would go of the divisible fund. On that footing the preference shareholder who was not as such bearing any double tax was bound to submit to the retention from his dividend of the full appropriate British tax. And the House overruled *Rover* v. *South African Breweries.* (2) Now it may well be, it almost certainly is, the fact that sub-s. 5 of s. 27 of the Finance Act of 1920 was already part of the Bill leading to that Act before the House of Lords' decision was given, although it must have

(1) 57 S. L. R. 15; [1921] 1 A. C. 172. (2) [1918] 2 Ch. 233.

been inserted after the decision in the Scottish Courts had been pronounced. It was inserted, that is to say, at a time when on the law as it had previously stood there was a conflict of opinion between the Scottish and the English Courts. In these circumstances, it is noticeable that the sub-section while, as my Lord has pointed out, appearing according to its language to state almost the opposite of that which was laid down by the House of Lords in the *Scottish Union* case (1), affirmatively adopts in substance the decision of Astbury J. in the case to which I have referred. And rightly or wrongly—it may be we must now say wrongly, unless it desired to alter the law—the Legislature by enacting sub-s. 5 was, I cannot doubt, minded to apply the principle which had so long been laid down by the Courts as the true one—namely, that a company's payment of British income tax being made on behalf of its shareholders it was right to give the same shareholders the benefit of this remission of that payment conceded to the company by the Legislature. That this was the intent of the Legislature is supported by the fact that there is in this sub-section no reference to an ordinary shareholder as distinguished from a preference shareholder; nor indeed could there on any view of the case properly be any such distinction, unless the exclusion from benefit of a preference shareholder were confined to one whose preference dividend was not in arrear." I think I get this much guidance from that case, first that though there may be no agency, in the strict sense, between a company and its shareholders, in the matter of payment of income tax, yet relief in respect of Dominion income tax obtained by a company is obtained on behalf of its shareholders in the sense, that the company must, in deducting income tax from dividends, pass on the benefit of the relief; and, secondly, that I must give effect to the language of the sub-section without allowing my mind to be drawn away by the history of the legislation in this matter.

It is said by the defendants that the words "reduced by any relief from that tax given under this section" means

(1) 57 S. L. R. 15; [1921] 1 A. C. 172.

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relief obtained by the company directly as applicant for relief under sub-s. 1, and that the words " in respect of any payment of Dominion income tax " are otiose unless they mean " relief in respect of an actual payment of tax made by the company " ; in other words, they say I must read the sub-section as saying " as reduced by any relief from that tax given directly by the Inland Revenue authorities to such body under this section in respect of any payment made by such body of Dominion income tax." The words " Relief from . . . . tax given under this section " would prima facie include relief from tax given under sub-s. 5 by a reduction in the amount of tax deducted from a dividend, and it is not apparent why in the absence of express words confining relief to relief given directly by the Inland Revenue authorities the prima facie meaning of the words should be cut down. I do not think the presence of the concluding words of the sub-section is sufficient to do so, and nothing else in the sub-section has been suggested as having that effect. I think, therefore, that a company which has the tax deducted from dividends paid to it reduced as the result of the operation of sub-s. 5 is itself within the operation of sub-s. 5 when it seeks to deduct tax from its own dividends under r. 20.

It remains to consider what is the effect of payment of a dividend free of tax. I think that such a dividend is one of such an amount as after the deduction of the proper rate of tax leaves the rate of interest specified available for the shareholder. Where the shareholder is liable to super tax he must return the gross amount of the dividend, and that amount will vary with the amount in respect of tax, which has not been received by the shareholder from the company. The amount not so received is the amount of the tax on the gross dividend, and is in my opinion in substance and in fact deducted by the company within the meaning of r. 20. Where, therefore, s. 27, sub-s. 5, of the Finance Act, 1920, would apply if the dividend was paid less tax, it will in my opinion equally apply where the dividend is paid tax free, that is to say, the gross amount of the dividend must be calculated on the footing that only the lesser rate of tax is deducted. It is

true that this makes no difference in the amount of cash which the shareholder puts in his pocket, but if he is a super tax payer it does affect the extent of his liability for that tax, and in this way the benefit of any relief under sub-s. 5 is passed on to the shareholder. The fact that the shareholder is a company not liable to super tax cannot make any difference in the principle to be applied.

From these conclusions, I think it follows that in each of the years under consideration the dividends received by the defendants from the New Company must be regarded as dividends from which tax was deducted at a rate reduced by relief given under the section in respect of Dominion income tax, and that the defendants were bound to pass on the benefit of the relief when deducting tax from dividends paid by them to the plaintiffs.

There must be a declaration to the effect asked for in the statement of claim, but, as I understand that the parties are agreed with regard to the figures, no other order will be necessary except that the defendants pay the plaintiffs' costs of action.

Solicitors for plaintiffs: *Lawrence, Webster, Messer & Nicholls.*

Solicitors for defendants: *Julius, Edwards & Julius.*

H. C. G.

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In re CASSEL.

PUBLIC TRUSTEE *v.* MOUNTBATTEN.

[1925. C. 4432.]

Will—Imperative Trust to maintain House and its Contents—Validity—Remoteness.

By his will the testator bequeathed "Brook House and contents" and the stables held therewith, the leases of which would expire in 1995, to trustees upon trust to permit his granddaughter E. to have the use and enjoyment thereof during her life, and after her death upon trust for such one or more of her children or issue as she should by will or deed appoint, and in default of such appointment for the first of her sons or, failing any son, the first of her daughters attaining twenty-one. Subject to these trusts the trustees were to hold "Brook House and contents" upon similar successive trusts in favour of (1.) his granddaughter R. and her family, (2.) his nephew and his family, and (3.) his niece and her family. The testator then directed that: "the rent outgoings rates and taxes for the time being payable in respect of the said messuage and premises and keeping the same and the contents thereof insured against fire and burglary and in a proper state of preservation shall be always paid by my trustees out of the income of my residuary personal estate":—

Held, that the clause charged the income of the residuary personal estate (during (*a*) the term of the leases, and (*b*) such time as the leases remained the property of a beneficiary deriving his or her title directly under the will) with the payment of an annual sum for the personal benefit of such beneficiary, the sum varying in amount according to ascertainable facts. That the direction did not violate the rule against perpetuities, because the right to the annual sum must vest within the legal period. That the duration of the right beyond that period was no infringement of the rule, which was concerned with the creation and vesting of interests and not with their duration. That the uncertainty of the quantum of the annual sum did not render the disposition void, because the interest arose and was vested within the legal period, and, although the amount necessary to satisfy it was expressed in uncertain terms, it was capable of being rendered certain; and because the whole property—namely, the interest in question and the property subject to that interest, was vested in some person or persons during the legal period.

Kennedy v. *Kennedy* [1914] A. C. 215 distinguished.

ADJOURNED SUMMONS.

The testator bequeathed to his trustees his leasehold messuage Brook House, and the stables No. 5 Woods Mews held in connection therewith, together with all fixtures,

furniture, pictures, silver plate, linen, china, glass, and other articles of household use or ornament (with certain exceptions) in or about or belonging to the same. The subject matter of this bequest he referred to as " Brook House and contents." The testator held Brook House under a lease granted to himself for a term of ninety years from September 29, 1905, at a rent of 610*l.* per annum and subject to full covenants for the repair and maintenance of the premises. The stables he held under a lease granted to him for an exactly similar term at a rent of 63*l.* per annum, and subject also to full covenants for repair and maintenance.

The trusts declared of Brook House and contents were to permit his sister to have the use and enjoyment thereof during her life. She survived the testator and died on September 16, 1925. After her death the trustees were to hold Brook House and contents upon trust to permit the testator's granddaughter Edwina Ashley to have the use and enjoyment thereof during her life, and after her death upon trust for such one or more of her children or issue as she should by deed or will appoint, and in default of and subject to any such appointment in trust for the first of her sons or her only son or failing any son the first of her daughters or her only daughter who attained the age of twenty-one years. Subject to these trusts the trustees were to hold Brook House and contents upon like trusts for his granddaughter Ruth Mary Clarisse Ashley and her children or child as were thereinbefore provided in the case of Edwina Ashley and her children or child. In the event of the failure of the absolute vesting of Brook House and contents in some one or more of the issue of either of his said granddaughters he directed that Brook House and contents should be held in trust for his nephew Sir Felix Cassel for his life, and after his death in trust for his (Sir Felix's) son Ernest James Cassel for his life, and after his death for the children and issue of Ernest James Cassel and for other children of Sir Felix born in the testator's lifetime and their issue as therein mentioned, and on failure to vest absolutely by virtue of the foregoing trusts then in trust for the first son or failing any sons the

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first daughter of Sir Felix born after the testator's death who should attain the age of twenty-one years; and failing any such child then in trust for his niece Anna Isabella Jenkins for her life, and after her death in trust for her daughter Marjorie for her life; and on her death for the children or remoter issue of Marjorie as she should by deed or will appoint, and in default of and subject to any such appointment upon trust for the first of her sons or her only son or failing any sons the first of her daughters or her only daughter who attained the age of twenty-one years or in the case of a daughter attained that age or married.

Immediately after these successive trusts in favour of (1.) Edwina Ashley and her family, (2.) Ruth Mary Ashley and her family, (3.) Sir Felix Cassel and his family, and (4.) Anna Isabella Jenkins and her family, there comes the clause the validity of which is raised by the summons.

The testator next expressed a wish that Brook House and contents should never be sold by any person entitled thereto under his will and he requested "each successive holder" to observe this wish. He then directed that in the event of the failure of absolute vesting under the several trusts and provisions thereinbefore contained of and concerning Brook House and contents, the same, so far as failing to vest, should on the failure or determination of such trusts and provisions be offered as a gift to the then reigning English Sovereign, but in case such offer should not be accepted he directed Brook House and contents to be held in trust for King Edward's Hospital Fund for London.

His residuary real and personal estate he devised and bequeathed upon trust for sale and conversion and investment and he directed the trustees to divide the said trust premises into eight equal parts. Of those eight equal parts five are again divisible into eight equal parts of which five parts (or 25/64ths of the whole) are disposed of for the benefit of Edwina Ashley and her children and issue, while the remaining three (or 15/64ths of the whole) are disposed of for the benefit of Ruth Mary Ashley and her children and issue. As to the remaining three equal parts of the trust premises one such

part (or 8/64ths of the whole) is disposed of for the benefit of Anna Isabella Jenkins her children and issue; the other two parts (or 16/64ths of the whole) are disposed of for the benefit of Sir Felix Cassel and his children and issue.

The summons asked whether the direction in the will that "the rent outgoings rates and taxes for the time being payable in respect of the said messuage and premises and keeping the same and the contents thereof insured against fire and burglary and in a proper state of preservation shall be always paid by my trustees out of the income of my residuary personal estate," was valid, or whether it was void and if so to what extent.

Bischoff for the Public Trustee.

Greene K.C. and *J. V. Nesbitt* for Lady Louis Mountbatten, tenant for life. The direction respecting the house follows immediately after an elaborate settlement in favour of members of the testator's family. The direction is limited to the life of the tenant for life and the life of the person in whom the house becomes absolutely vested. If instead of putting the direction in this form the testator had directed his trustees to pay out of his residuary personal estate an annuity to the persons interested under the family trusts the direction would have been good, because a gift to A. for life, then to her unborn children, and then to an ascertained person is good, provided the period of vesting is not postponed: *Evans* v. *Walker* (1); *Wainwright* v. *Miller*. (2) Considered as an annuity of varying amount the gift of an annuity to Lady Louis Mountbatten for life, and, after her death, to her children, would be good. If it were not so treated it must be treated as a direction to make independent payments during a succession of years, some of the payments falling within and some without the period permitted by the rule against perpetuities.

In that case, then, so far as Lady Louis Mountbatten was concerned, the direction was valid for her life and twenty-one years after.

(1) (1876) 3 Ch. D. 211, 213. (2) [1897] 2 Ch. 255, 259.

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A future interest was not obnoxious to the rule if it began within the proper period, although it might end beyond it; in which case, if it were a limited interest, it might tie up the property for more than twenty-one years beyond a life in being. But if the trust were a discretionary one, for the maintenance of the children of A. until the youngest attained twenty-five, and for the accumulation of surplus income it would be bad, because no child would take a vested interest within the period allowed by the rule: Jarman on Wills, 6th ed., p. 301; *In re Blew.* (1) And as a gift to an unborn person for life is good, so the gift of a life interest to an unborn person, determinable on a certain event happening during his lifetime, is good, although the event may not happen within the period of a life in being and twenty-one years after: Jarman on Wills, p. 349.

The testator was bound by the lease and was liable to pay the rent, rates and taxes, and outgoings on the house. The trust was one for the payment of those liabilities, with the exception of the payment of the insurance premiums, and therefore did not offend against the rule: *In re Earl of Stamford and Warrington.* (2)

Preston K.C. and *R. W. Turnbull* for the infant daughter of the tenant for life. The rule against perpetuities is only concerned with the vesting of an interest, and my client's interest must vest within the period although it may continue beyond. The direction is one for the benefit of persons whose interests begin within the period and is therefore valid: Gray on Perpetuities, 3rd ed., p. 207. In *Evans* v. *Walker* (3) the testator gave an annuity to A. for life, and, after her death, for life to any children she might have equally, and on the death of the survivor to his nephew and nieces equally. A. died without issue. It was held that the gift to the nephew and nieces was not void for remoteness because there was no objection to a gift to unborn children for life, and then to an ascertained person, provided the vesting was not postponed. This was followed by Byrne J. in *Wainwright* v. *Miller.* (4)

(1) [1906] 1 Ch. 624.
(2) [1912] 1 Ch. 343, 368.
(3) 3 Ch. D. 211.
(4) [1897] 2 Ch. 255, 259.

Maugham K.C. and *W. M. Hunt* for the tenants for life in remainder. The argument that you can treat this direction as a valid trust for the payment of debts is unsound. The word "debt," as used by lawyers, bears no resemblance to liability. It is clear from the use of the word "always" that the trustees are to apply the necessary sums to pay rent, rates, and outgoings during the rest of the lease. The trust would continue during the lives of unborn children of the various tenants for life and might not end within the legal period. On construction the clause could not be limited to the period of enjoyment of the testator's granddaughters and their children, or his nephew and niece and their children. There is no ground for saying that on the death of Mr. Preston's client the trust comes to an end. There is a positive direction that the trust is to continue after unborn children have obtained a vested interest in the house. The trust would continue on a sub-demise or assignment of the house, because there is nothing to end it, and the purchaser could call on the trustees to carry it out. There is no annuitant here. If there is an annuity it is one to the house. The true nature of the clause is that it is a trust under which sums of uncertain amount may have to be taken from the income of residue and be applied beyond the legal period. Thus in *In re De Sommery* (1) the trustees of the will were given power to pay either capital or income to Eugene De Sommery, and that being a power which was only capable of being exercised during his life, was held to be good. But a power of applying either capital or income for the benefit of Eugene, his wife or children, whether alive at testatrix's death, or not, was held to be avoided by the rule against perpetuities. This trust is discretionary as to the amount to be expended in preserving the house and premises, and, on an event which may happen outside the legal period, a large sum may have to be taken from income. The trust is therefore bad, just as the trust to pay a sum at a particular period for the benefit of the children of Eugene was bad.

In order that an estate may arise upon an appointment

(1) [1912] 2 Ch. 622.

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under a power, it is a condition precedent that the power be exercised; and if a power can be exercised more than twenty-one years after a life in being, a condition precedent to the estate may be fulfilled at such a time that the estate appointed may vest at a period too remote under the rule against perpetuities: Gray on Perpetuities, 3rd ed., p. 397.

That applies to a trust to maintain. It is not the trust which is too remote, but each and every interest created under the trust is, on a contingency which might happen, for example a fire, too remote. As was said in *In re Blew* (1), the trust might be exercisable in respect of a fund which might not come into existence until beyond the legal period, and was therefore void.

In *Kennedy* v. *Kennedy* (2) the testator left his residuary estate to trustees to be used by them at their discretion in maintaining and keeping up his dwelling-house. The question was whether a limit could be assigned to the discretionary trust affecting the residue. Lord Parker said: "The trust is not to keep up a home for these three persons, but to keep up and maintain a dwelling-house as kept up and maintained before the testator's death. It is a trust which, if valid, would enure for the benefit of all persons for the time being interested in the dwelling-house, and is by the testator himself contemplated as coming to an end only if the dwelling-house be sold, an event which may not take place within the period allowed by the rule against perpetuities. The trustees, or a majority of them, are to determine, as occasion arises, the amount to be expended, and there can be no person entitled to determine the trust as long as there is any part of the trust fund remaining unexpended, provided the dwelling-house is still unsold. Under these circumstances their Lordships are of opinion that the trust offends against the perpetuity rule and is void: see *In re Clark* (3); *In re Blew* (1); *In re De Sommery* (4)." The trust here is to do something "always" and is not severable. There is no annuity here to the

(1) [1906] 1 Ch. 624.
(2) [1914] A. C. 215, 220.
(3) [1901] 2 Ch. 110.
(4) [1912] 2 Ch. 622, 630.

beneficiaries but only a trust to apply sums for the maintenance of the house upon contingencies which may not arise until after the legal period. The trust is therefore void.

Greene K.C. in reply. On the true construction of this will a purchaser as such would not be entitled to enforce the direction to the trustees. This is a gift to the beneficiaries under the will and it is a benefit which they can assign. On attaining the age of twenty-one Lady Louis' daughter would obtain an absolute vested interest in the lease and also an absolute vested right to have the money applied in the manner indicated. If there had been a gift of an annuity to every person having a vested interest in the house such person would obtain a vested interest in the annuity. The trust is one for the benefit of living people, not for a house, and within its limits assignable by them. The testator had in mind the members of his family who would live in the house. The perpetuity rule cannot affect the vested rights of the beneficiaries to have these payments made for their benefit, for, the right being vested during the period, only the quantum remains to be fixed. Cases of powers and discretionary trusts where the interest is not vested have no application here. An annuity to last for a hundred years to A. for life and after his death to any wife he may have married and then to his children for life would be good, because the interest of the children must vest within twenty-one years of the death of A. Can it be said that if a direction be added that the annuity is to be free of income tax then the whole is bad, because the quantum of the annuity may have to be ascertained outside the period? The rule against perpetuities has nothing to do with the postponement of enjoyment, it is only concerned with the time of vesting.

In Gray on Perpetuities, 3rd ed., p. 207, it is laid down that an interest is not obnoxious to the rule if it begins within lives in being and twenty-one years, although it may end beyond them.

Such cases as *In re Blew* (1); *In re De Sommery* (2); and

(1) [1906] 1 Ch. 624. (2) [1912] 2 Ch. 622.

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Kennedy v. *Kennedy* (1) merely show that if the vesting is effected, or is liable to be effected, outside the legal period, then the rule applies.

Cur. adv. vult.

Feb. 25. RUSSELL J. This summons raises a difficult question as to the validity of a certain disposition made by the will of the late Sir Ernest Cassel of part of the income of his residuary personal estate. [His Lordship read the clause.] The first question asked by the summons is whether the direction contained in that clause is a valid and effective direction, or whether it is void to any and what extent. It is contended that the direction is wholly void as being a disposition which transgresses the rule against perpetuities.

The first thing to do is to examine and construe the clause apart from the rule, to ascertain who are the beneficiaries under the clause, and what are the nature, extent, and incidents of their interests thereunder. Having done this, I must then consider whether all or any of the interests given are too remote and offend against the rule.

In the first place it is clear that the word " always " cannot mean for all time. The period during which the clause operates according to its tenor cannot extend beyond the existence of the leases, that is, beyond September 29, 1995. Is the operation of the clause further confined to the period during which the leases are enjoyed by beneficiaries under the will, or does it continue to operate in favour of a person who has acquired a title to one or other of the leases not as a cestui que trust under the will, but as an original assignee of or purchaser from such a cestui que trust, or indeed as a subsequent assignee or purchaser of such original assignee or purchaser ?

It was contended that nothing was to be found limiting the duration of the clause's operation in any way (except the duration of the leases), and that accordingly I was not entitled to read into it any such limitation. In my opinion I am bound to give the clause a common-sense interpretation,

(1) [1914] A. C. 215.

if the language used by the testator and the whole context of the will admits of it. Apart from charitable bequests a testator does not intend to give benefits to persons unknown to him or to persons with whom he is not connected either by ties of friendship or relationship; and to me it is inconceivable that the testator intended by this clause to confer a benefit (and a substantial benefit) on a person who would probably be a total stranger to him (or who indeed might conceivably have been a bitter enemy) just because that person happened to become the owner of one or other of the leases.

The clause in question comes immediately after the completion of what I may call the trusts of Brook House and contents in favour of relations of the testator. It does not apply to the case of the bequest going to the English Sovereign or the Hospital Fund. The testator's phrase "each successive holder" means, in my opinion, each successive beneficiary previously mentioned in the will. On consideration it appears to me that this is a clause the object of which is to relieve the particular relation of the testator described in the will, who for the time being is the beneficial owner under the will of the leases, from burdens which he or she might be or feel bound to bear.

Thus construed the clause charges the income of the residuary personal estate, during (*a*) the term of the leases and (*b*) such time as the leases remain the property of a beneficiary deriving his or her title directly under the will, with the payment of an annual sum in relief and for the personal benefit of such beneficiary; the annual sum varying in amount according to certain ascertainable facts.

Does such a provision violate the rule against perpetuities? It is conceded that so far as the absolute interest in Brook House and contents is concerned, it must vest within the perpetuity period. If I am right in my construction of the clause in question the right to have the annual sum in question applied must necessarily also vest within that period. Thus, to take a concrete case, Edwina Ashley is now entitled to that right during her life; if the defendant Patricia is the

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only child of Edwina and she attains twenty-one she will become absolutely entitled to that right—namely, the right to have the variable annual sum applied for her personal relief and benefit so long as the leases endure, and remain her property.

True it is that assuming the leases remained unsold, the interest of the person or persons absolutely entitled might enure beyond the period of lives in being and twenty-one years after; and it was suggested that this possibility would avoid the clause. In my opinion this suggestion is unsound. The perpetuity rule is concerned with the creation and vesting of interests, not with their duration. If the interest must necessarily arise and be vested within the period, its duration beyond the period is no infringement of the rule.

As is pointed out in Gray on Perpetuities, 3rd ed., p. 207, an interest is not obnoxious to the rule if it begins within lives in being and twenty-one years, although it may end beyond them. In other words the rule prohibits vesting outside the period. It does not prohibit distribution beyond the period.

It was, however, further argued that the uncertainty of the quantum of the annual sum rendered the disposition void, because the exact quantum of the interest could not be ascertained within the limit of the rule. This contention, if sound, would produce far-reaching results. A bequest of an annuity of 100*l.* per annum for 1000 years to A. for life and after his death to any wife of his for her life and after her death to A.'s children for life would be good; but if given free of tax would be bad, for the actual amount payable to the children might not be ascertainable within the perpetuity period. The answer seems to me to be that the interest arises and is vested during the period, and that although the amount necessary to satisfy it is expressed in uncertain terms it is always capable of being rendered certain; and that the whole property (that is to say the interest in question and the property which is subject to that interest) is vested in some person or persons during the necessary period.

The cases relied upon in support of the proposition that

this disposition was void were *In re De Sommery* (1); *In re Blew* (2); and *Kennedy* v. *Kennedy*. (3) *In re De Sommery* (1) was a case in which a special power was held bad because it was capable of being exercised at a time or times beyond the period allowed by law. In other words interests could be created and come into existence by an exercise of the power after the perpetuity period had run out.

In *In re Blew* (2) a testator devised and bequeathed real and personal estate to trustees upon trust to apply the income thereof in such proportions and generally in such manner as to them in their absolute discretion should seem best for the support of his son and his wife and children or any of them, or to accumulate the same or any part thereof at their like discretion for the benefit of the children of his son who should become entitled to the corpus; and subject to such discretionary trust he directed his trustees to pay the income to his son for life and after his death to his widow during widowhood and after the death or remarriage of the widow upon trust as to corpus and income for the children of his son who attained twenty-one or (in the case of daughters) married. The son had died leaving a widow and an only son who had attained twenty-one. The widow had not remarried. The son and the widow claimed to have the trust funds handed over, and the question for decision was whether the discretionary trust was still exercisable. Warrington J. held that upon the true construction of the will the trust for maintenance was limited to the life of the testator's son; but he also considered the position upon the footing that this construction was wrong. He came to the conclusion that (upon that view) the trust would last so long as any child of the testator's son was alive, that it would be exercisable during the life of any child of the testator's son whose life might last more than twenty-one years after the death of his father, and that therefore the trust infringed the rule. I understand the learned judge to mean that the exercise from time to time by the trustees of their discretion under the trust would create

(1) [1912] 2 Ch. 622. (2) [1906] 1 Ch. 624.
(3) [1914] A. C. 215.

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new interests, some or indeed all of which might come into existence at points of time after the perpetuity period had run out. That this was his view is I think made clear when he points out the distinction between *Gooding* v. *Read* (1) and the case under consideration before him.

Neither *In re Blew* (2) nor *In re De Sommery* (3) appear to me to govern the present case if I am right in my view that the beneficial interests conferred by the clause here in question necessarily arise and become vested within the perpetuity period.

Kennedy v. *Kennedy* (4) causes more difficulty, but the clue to that decision appears to be that upon the true construction of Kennedy's will the trust there in question was held to be a discretionary trust not merely for the personal benefit of the persons to whom the testator had given a beneficial interest in the house, but for the benefit of all persons for the time being interested in the house until the sale thereof. Upon that construction it is evident that new interests might well arise at a point of time beyond the perpetuity period.

Upon the true construction of Sir Ernest Cassel's will, the clause there contained is in my opinion not a discretionary trust but an imperative trust which is only operative for the personal benefit and relief of each of the testator's relations referred to in the dispositions of Brook House and contents, so long as she or he continues to be the beneficial owner of the leases under the will.

The decision in *Kennedy* v. *Kennedy* (4) does not in my opinion govern the present case. As I have said, the point for decision is a difficult one, but upon the whole I have come to the conclusion that the clause in question is a valid and effective direction, and I answer the question accordingly.

Solicitors: *Norton, Rose & Co.; Nicholl, Manisty & Co.*

(1) (1853) 4 D. M. & G. 510.
(2) [1906] 1 Ch. 624.
(3) [1912] 2 Ch. 622.
(4) [1914] A. C. 215.

J. B. B. M.

METROPOLITAN TUNNEL AND PUBLIC WORKS, LIMITED *v.* LONDON ELECTRIC RAILWAY COMPANY.

[1925. M. 2510.]

C. A. 1926 LAWRENCE J. *Jan.* 19. C. A. *Feb.* 8.

Arbitration—Engineering Contract—Agreement to refer Questions of Construction of Contract—Staying Legal Proceedings—Questions of Law—Arbitration Act, 1889 (52 & 53 *Vict. c.* 49), *s.* 4.

By a contract dated May 30, 1924, the plaintiffs agreed with the defendants to execute certain specified railway works at prices contained in schedules amounting to 359,383*l.* 0*s.* 10*d.*, and with the addition thereto of 10 per cent. for "general contingencies," amounting in the aggregate to 395,321*l.* 6*s.* 11*d.*, and there was incorporated in the contract a letter from the defendants accepting the plaintiffs' tender for that sum. The contract provided for the payment by monthly instalments on the certificate of the defendants' engineer at the rate of 90 per cent. of the value of the work actually executed, the remaining 10 per cent. to be treated as a retention fund, and further provided that any question arising between the parties in connection with the contract, or as to the construction or meaning of the contract, should be referred to the decision of an engineer to be agreed upon, or, failing agreement, to be nominated by the President for the time being of the Institute of Civil Engineers, and such submission should be deemed a submission to arbitration within the Arbitration Act, 1889. An originating summons having been taken out by the plaintiffs for the determination of the question whether upon the true construction of the contract, for the purpose of the monthly payments to be made to the plaintiffs thereunder, the value of the work executed was to be ascertained by adding to the prices contained in the schedules a proportionate amount of the sum therein provided for "general contingencies," the defendants moved for a stay of proceedings under the summons pursuant to s. 4 of the Arbitration Act, 1889, on the ground that the plaintiffs had agreed that the question should be referred to arbitration as in the contract provided:—

Held, by Lawrence J., that the question raised was purely a question of law arising out of the construction of the contract, and that, in the absence of any present dispute as to the practice or custom in the engineering industry or other surrounding facts, and in the absence of any present question of account or detail, it was more convenient that the Court should ascertain for itself in the pending proceedings any facts necessary for the purpose of determining the question of construction, than that the question should be referred to an arbitrator to state the facts and the matter come back to the Court on the question of construction.

Held, therefore, that the motion must be refused.

On appeal:—

Held, by Lord Hanworth M.R. and Scrutton L.J. (Sargant L.J.

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dissenting), reversing the decision of Lawrence J., that there was a clear and definite contract between the parties that the matter in dispute should be referred to an engineer arbitrator as being a person who possessed the necessary technical knowledge for dealing with the subject matter of the contract; that if the Court allowed the action to proceed evidence would be necessary in order to put the Court in a position to determine the technical meaning of the expression "general contingencies" and a number of other expressions used in the contract; that the meaning of those expressions in an engineering contract would be perfectly familiar and would present no difficulty to the engineer to whom the parties had agreed to refer the decision of their disputes; and that the case was not one which involved a simple question of law.

Held, therefore, that the plaintiffs had not discharged the onus of showing that the dispute was one which ought not to be referred to arbitration and accordingly the arbitration ought to proceed.

Held, by Sargant L.J., that Lawrence J., having duly weighed the general probabilities of the case and having, without infringing any question of principle, come to the conclusion that the matter would be better and more expeditiously dealt with if the legal proceedings which had been commenced were allowed to continue, the Court ought not to interfere with the decision arrived at by him in the exercise of the discretion vested in him by s. 4 of the Arbitration Act, 1889.

Bristol Corporation v. *John Aird & Co.* [1913] A. C. 241 discussed.

MOTION.

By a contract dated May 30, 1924, and made between the defendant company of the one part and the plaintiff company (therein called the "contractors") of the other part, after reciting that the defendants had accepted an offer from the contractors to execute and deliver to the defendants the works thereinafter described or referred to and to perform the services thereinafter mentioned upon the terms and subject to the provisions thereinafter mentioned and at the prices set forth in the schedules thereto, the plaintiffs agreed to execute such parts of the works described in the first schedule thereto as the defendants might from time to time decide to construct, such works being the construction of the tunnels for the Charing Cross and Kennington Extension of the defendants' railways authorized by the London Electric Railway Act, 1923. The approximate prices agreed to be paid for the several bills of quantities summarized in the second schedule to the contract and for sundry items amounted to 359,383*l.* 0*s.* 10*d.*, which, with the addition of the sum of 35,938*l.* 6*s.* 1*d.*, being 10 per cent. of the first-mentioned sum

for "general contingencies," amounted in the aggregate to 395,321*l.* 6*s.* 11*d.* It was stated in cl. 29 of the first schedule to the contract that the intention of the parties was that the contract should be a "Schedule of prices contract," based upon the prices set forth in the bills of quantities which were approximate only and were furnished for the general guidance of the contractors.

The material clauses of the contract were the following :—

Clause 43 : "Payment as the work proceeds will be made by way of advance to the contractors by the company on the certificate of the engineer and to such extent as he may from time to time certify to be proper, each such payment to amount to 90 per cent. of the value of the work actually executed since the preceding certificate or (in the case of a first certificate) since the commencement of the works, and the remaining 10 per cent. shall be treated as a retention fund, and one half of the total amount of such retention fund shall be paid on the certificate of the engineer that the work has been properly constructed, and the balance of such retention fund on the like certificate that the work has been duly maintained by the contractors for three calendar months after completion."

Clause 44 : "Notwithstanding anything hereinbefore provided it is distinctly understood and agreed that the periodical certificates of the engineer are to be considered merely as certificates for payments by way of advance and shall not be held to signify his unconditional approval of the whole or any portion of the works included in such certificates."

Clause 54 : "Every certificate in writing by the engineer and every decision requirement or order given or made by him in accordance with the provisions of this contract with regard to any matter left to the control, approval, or decision of the engineer, shall be binding and conclusive on the parties. Save and subject as aforesaid if and when any question shall arise between the contractors and the company or the contractors and the engineer in connection with this contract or as to the construction or meaning of this contract the

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question at issue shall be referred to the decision of an engineer to be agreed upon by the company and the contractors, or failing agreement to be nominated by the President for the time being of Institution of Civil Engineers, and the decision of such arbitrator shall be final and binding upon both parties; and the submission shall be deemed a submission to arbitration within the Arbitration Act, 1889."

The contract was the result of the acceptance by the defendants of a tender by the plaintiffs to execute the works for the sum of 395,321*l.*, such letter of acceptance being dated April 22, 1924, and being expressed in the contract to form part of the contract for all purposes.

In consequence of differences between the parties to the contract as to the proper mode of ascertaining the value of the works executed for the purpose of payment under cl. 43 thereof negotiations took place between them with the view of appointing an arbitrator; but, before any definite arrangement was made, the plaintiffs, being advised that the question in dispute was one of law and unsuitable for the decision of an engineer, requested the defendants to agree to the arbitrator stating his award in the form of a special case. The defendants having declined that proposal, the plaintiffs, thereupon, took out an originating summons for the determination of the question whether, upon the true construction of the contract, for the purpose of the payments to be made to the plaintiffs thereunder, the value of the works executed by the plaintiffs ought to be ascertained by adding to the prices respectively a proportionate amount in each case of the sum therein provided for "general contingencies."

The defendants on December 8, 1925, entered an appearance to the summons, and on the same day wrote a letter to the plaintiffs' solicitors informing them thereof and adding that "our clients, of course, reserve all their rights to object to the proceedings and otherwise, and the appearance is entered without prejudice to these." On December 10 the plaintiffs gave notice to the defendants of an appointment before the Master on December 16. The defendants by their solicitors attended the appointment, at which the plaintiffs' solicitors

asked for leave to amend a slip in the summons; and the Master made an order to which the defendants by their solicitors assented, provided the amendment was deferred until the evidence was closed. Later, the plaintiffs consented to the defendants having further time to file their evidence; but, according to the evidence of Mr. Eames, who represented the defendants at the hearing before the Master, he, throughout the hearing, objected to the proceedings taken by the plaintiffs, and submitted that they were misconceived and ought not to be entertained.

On January 12, 1926, the defendants served a notice of motion on the plaintiffs to stay all further proceedings under the summons, pursuant to s. 4 of the Arbitration Act, 1889, on the ground that the plaintiffs and the defendants had, under the submission contained in the contract of May 30, 1924, agreed to refer the question in dispute to arbitration. Mr. Harley H. Dalrymple-Haye, a member of the Institution of Civil Engineers, made an affidavit, in which he stated that there were two forms of contract in use for the construction of tube railways and similar engineering works, which were known by the technical names of "Schedule of prices contract" and a "Lump sum contract." In describing the procedure under the first named form of contract, he stated that it had been for many years and still was an invariable custom in the engineering industry that, under that form of contract, no part of the percentage to cover unforeseen contingencies should be paid to the contractor, unless and until such contingencies had actually arisen and been dealt with by the contractor. He also stated that the percentage fixed for general contingencies was the maximum which was to be payable to the contractor on account thereof in any event; and that in the case of a "Lump sum contract," the amount of the consideration to be paid to the contractor was definitely fixed when the contract was made.

Mr. Mitchell and Mr. Chard, who were respectively the secretaries of the defendant and the plaintiff companies, made affidavits stating their reasons, the one in favour of

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and the other against the question being referred to an engineer.

The motion was heard before Lawrence J. on Jan. 19, 1926.

Jenkins K.C. and *Dighton Pollock* for the applicants (the defendants). The question is not purely one of law, but to a large extent one of fact, involving evidence of the practice and custom of the engineering industry in connection with such contracts as are known as "Schedule of prices contracts," of which the contract in question is an instance: the question therefore is peculiarly suitable for the decision of a technical arbitration. Technical evidence is required to explain the meaning of such terms of art as a "Schedule of prices contract" and "general contingencies," in the engineering industry. There is no rigid rule. The Court has a discretion under s. 4 of the Act of 1889. This is not an ordinary case of construction in which the Court has to look at the document and nothing else with such knowledge of the surrounding facts as are known to each of the parties. This is a business contract somewhat complicated in its details and involving the meaning of technical terms according to the practice and custom of the engineering industry. There are here mixed questions of fact and law, and the question is one which ought to be referred to arbitration.

[They cited *In re Carlisle* (1) and *Bristol Corporation* v. *John Aird & Co.* (2)]

Owen Thompson K.C. and *H. O. Danckwerts* for the respondents (the plaintiffs). First, we take the preliminary objection that the defendants have precluded themselves from applying for a stay of the proceedings under the summons by having taken a step in those proceedings within the meaning of s. 4 of the Arbitration Act, 1889. Secondly, the question is one of pure law, depending upon the proper construction of the contract, and is not a suitable one to be determined by an engineer acting as arbitrator: Russell on Arbitration and Award, 11th ed., p. 109.

(1) (1890) 44 Ch. D. 200, 203. (2) [1913] A. C. 241, 261, 262.

LAWRENCE J. [after deciding that in the circumstances of the case, the defendants had not taken any step in the proceedings commenced by the plaintiffs which had the effect of precluding them from applying to the Court, under s. 4 of the Arbitration Act, 1889, for a stay of those proceedings, continued :] In this case the plaintiffs have taken out a summons for the construction of a contract dated May 30, 1924, between the defendants and the plaintiffs for the execution of works in London, containing, besides the main operative part, certain general conditions, specifications, bills of quantities, schedule of prices and other details. The contract incorporates a letter of April 22, 1924, whereby the defendants accepted a tender made by the plaintiffs for a lump sum. I mention that, because it is alleged to have some bearing upon the point which the plaintiffs desire to have decided.

The summons asks the Court to determine a single point of construction upon the contract. Clause 43 of the general conditions in the first schedule to the contract provides as follows : [His Lordship read the clause, and continued :] The question which the plaintiffs have raised is, whether, on the true construction of cl. 43, the expression " the value of the work actually executed " includes a proportionate part of the amount set against the item " general contingencies " in the summary of the approximate bills of quantities in the second schedule. The plaintiffs allege—and it appears to be an admitted fact—that the certificates hitherto given by the engineer have been for the value of the work actually done, without any addition for contingencies ; and they contend that such an addition ought to have been made and that the engineer has been making his certificates on a wrong principle. The summons raises no conflict of fact, and the affidavit in support merely states those facts which I have mentioned, none of which seem to be capable of dispute. The defendants are now moving the Court for a stay of the proceedings under the summons pursuant to the provisions of s. 4 of the Arbitration Act, 1889.

The arbitration clause in the contract is a wide one, and

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includes the determination of any question "of the construction or meaning of this contract"; and, therefore, it is clear that the question which has been raised on the summons is well within the arbitration clause. The arbitrator under that clause is to be an engineer to be nominated by both parties, or in default of agreement by the President for the time being of the Institution of Civil Engineers.

The defendants contend that the question which is raised by the summons is not purely a question of law, and Mr. Mitchell in his affidavit on behalf of the defendants puts it in this way: "The question between the parties in these proceedings . . . . is to a great extent a question of practice, that is, of the practice and custom of the engineering industry in connection with such agreements as the one in question, which are known technically as 'Schedule of prices contracts,' so that the question is peculiarly suitable for decision by a technical arbitrator." What therefore the defendants desire to do in this case, is to adduce evidence on the hearing of the summons as to the practice and custom of the engineering industry. How far they are entitled to do that upon a question of construction, I do not propose to consider at the present stage. It may or it may not be fit and proper for the tribunal which has to decide the question of construction to admit evidence of practice and custom, for the purpose of deciding the question in dispute between the parties. I can readily conceive that questions as to the admissibility of any such evidence may arise, but at the present time there is no trace of any dispute, even on the question of the existence of such a practice and custom. It is possible that there may be such a dispute, but I have not, so far, heard of any. It may, on the other hand, happen that the plaintiffs will not dispute the alleged practice and custom when it comes to be stated, but will contend that, in the face of an express contract, it has no bearing on the question of construction, and that evidence of it ought not to be admitted. It seems to me, after all, that the question which has been raised is one simply concerning the construction of the contract, and that being the sole question is a question of

law. In saying that, I must not be taken to mean that the tribunal which will have to decide that question may not require to be informed of surrounding facts and of all other facts proper for it to know in construing such a contract. That is the function of every Court which decides questions of law, because no Court will decide an abstract question of law, and will only give its decision after having ascertained the facts upon which the question of law arises. Here there is no question of account or detail to be gone into at all, and the question raised by the summons is, therefore, not one which would involve, in addition to questions of law, an examination into the details of the work done or any question of account.

In the circumstances of this case my view is that it would be more convenient and proper to allow this summons to proceed and to have the decision of the Court upon it. I would respectfully adopt the language of Lord Parker in *Bristol Corporation* v. *John Aird & Co.* (1), where he states: "Everybody knows that with regard to the construction of an agreement it is absolutely useless to stay the action, because it will only come back to the Court on a case stated; therefore, it is more convenient on a question of construction to allow the action to proceed; and at the same time with regard to accounts and matters of detail to allow the arbitration to proceed." The latter part of the last sentence does not apply to the present case. What Lord Parker in that passage is alluding to is that under s. 19 of the Arbitration Act, the arbitrator may himself, at any stage of the proceedings, state in the form of a special case for the opinion of the Court, any questions of law arising in the course of the reference, or he may be directed by the Court or a judge to do so, at the instance of either of the parties to the reference. Here, as I have stated, the sole question is one of construction, and, therefore, what would happen, if the case went before the arbitrator, would be that either the arbitrator himself would state a case, or else the Court would, at the instance of either party, direct him to state a case. In my view, it

(1) [1913] A. C. 241, 261, 262.

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is more convenient that the facts necessary for the purpose of determining this question of construction should be ascertained in the present proceedings, and that it would be burdensome and inconvenient to have an elaborate arbitration, merely for the purpose of stating the facts which might not even come into dispute. For the reasons I have stated, I have come to the conclusion, exercising my discretion under s. 4 of the Act, that the summons ought to proceed. Therefore, I refuse the motion and direct the costs of it to be the plaintiffs' costs in any event.

H. C. H.

C. A.

The defendants appealed. The appeal was heard on February 8, 1926.

Jenkins K.C. and *Dighton Pollock* for the appellants. The proceedings taken by the plaintiffs ought to be stayed. The case is a peculiar one, and involves the determination of the meaning of a number of technical terms with which an engineer would be more conversant than the Court. The parties have selected their own tribunal, and there is no ground for interference by the Court.

[LORD HANWORTH M.R. This seems to be a case which prima facie ought to be referred to arbitration. The onus is on the respondents to show that it ought not to be so referred.]

Owen Thompson K.C. and *H. O. Danckwerts* for the respondents. Two questions arise on this appeal: (1.) as to the construction of the contract, and (2.) whether the defendants have not taken a step in the proceedings which precludes them from objecting to a stay.

On the first point it is submitted that the judge has exercised his discretion on the materials before him whether he would grant a stay of proceedings, and this Court will not lightly interfere with that exercise of his discretion. The matter in dispute is a pure question of law—namely, the construction of cl. 43 of the contract when read in connection with the relevant surrounding circumstances. The appellants wish to have that question determined by an engineer as

arbitrator, and to adduce before him evidence as to the custom and practice prevailing in the engineering industry. The respondents contend that no question of custom or practice arises, and that such evidence if adduced would be irrelevant. It is a pure question of law arising on the construction of the contract.

The passage in the judgment of Lord Parker in *Bristol Corporation* v. *John Aird & Co.* (1), which was relied upon by the learned judge as a ground for allowing a stay, is supported by *Lyon* v. *Johnson* (2); *In re Carlisle* (3); *Barnes* v. *Youngs* (4); *Bonnin* v. *Neame.* (5)

[LORD HANWORTH M.R. referred to *Russell* v. *Russell.* (6)]

It is admitted that the actual decision in *Rowe Brothers & Co.* v. *Crossley Brothers, Ld.* (7) is against the respondents; but in that case Cozens-Hardy M.R. said: "This is not a case in which questions of law can be kept apart from the facts of the case. If, for instance, it had been merely a question of law arising upon the construction of certain words in a lease or a contract of sale, or what not, I can quite conceive that the Court might say—as the Court has done in one or two cases—that there is only a question of law here, and that it is idle to refer that to arbitration, because the first thing the arbitrator would undoubtedly do would be to refer that to the Court for the decision of the Court as a question of law." Those observations, it is submitted, apply to the present case, and support the respondents' contention that a stay should be granted.

On the second point the defendants have, by agreeing to the form of order made by the Master when the matter was before him, taken a step in the action which precludes them from objecting to the proceedings being continued: *Richardson* v. *Le Maitre.* (8)

[LORD HANWORTH M.R. In that case there was no such letter as there was in this case objecting to the proceedings.]

(1) [1913] A. C. 241, 261, 262.
(2) (1889) 40 Ch. D. 579.
(3) 44 Ch. D. 200.
(4) [1898] 1 Ch. 414.
(5) [1910] 1 Ch. 732.
(6) (1880) 14 Ch. D. 471.
(7) (1912) 108 L. T. 11, 14.
(8) [1903] 2 Ch. 222.

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Dighton Pollock in reply. All the cases cited differ from the present in their facts. This is a highly technical contract and should be dealt with by the technical arbitrator upon whom the parties have agreed. It is an elementary rule that parties who make contracts should be bound by them: *Willesford* v. *Watson*. (1) There is ample evidence to show that this case can be determined better by a technical arbitrator of the kind agreed upon by the parties than by the Court.

LORD HANWORTH M.R. This is an appeal from Lawrence J., who refused to make an order staying these proceedings, which have been instituted by originating summons.

The case arises in this way: A contract has been entered into between the plaintiffs and the defendants for the construction of certain tunnel work which the defendants wish to have completed. The work, and the nature of the work, and the terms of the contract with which any tenderer would have to comply are embodied in a book, which has been produced to us, called Contract No. 1, and tenders were made upon the basis of the terms and conditions contained in that book. On March 19, 1924, the plaintiffs submitted their tender, and on April 22 that tender was accepted by the defendants, and the contract was signed on May 30 of that year. The work was of some considerable amount, and the price that was to be paid was indicated in a schedule, showing a total sum of 359,383*l*., which is to be paid in respect of four bills, or separate works which are to be executed. Additional to those, there are sundry items, which are printed in the document which is submitted to those who tender, and there is a printed item: "General contingencies, 10 per cent." Having, therefore, arrived at their figure of 359,000*l*., the plaintiffs inserted 10 per cent. on that; that was 35,938*l*., and made a grand total of 395,321*l*.

As I understand, the work was commenced, and a considerable amount has been done, but a question has now arisen in the course of payments which are being made by the defendants to the plaintiffs.

(1) (1873) L. R. 8 Ch. 473, 480.

It is necessary to look, quite shortly, at two or three clauses which appear in the contract. [His Lordship read clauses 43, 44 and 54 (arbitration), and continued :] That arbitration clause is a wide one. It places within the jurisdiction of the arbitrator, who is to be an engineer, any question which arises in connection with this contract, or as to its construction or meaning.

A question has arisen between the parties which, it is admitted, clearly falls within that clause, and it is this. It is said that in the course of making payments the certificates which are to be given by the engineer ought to be 90 per cent. of the grand total, the 395,321*l.*, whereas, as a matter of fact, the certificates, so far, have neglected the general contingencies fund of 35,938*l.*, and have been dealing with 90 per cent. of the 359,383*l.* A number of questions will arise before it can be determined which view is right. The certificate that is to be granted is to be 90 per cent. of the work which has been actually executed since the commencement of the work, and it will be, I suppose, a question to be decided whether the contingencies fund has been actually thrown into the grand total so as to remain in it, whatever may happen, and has ceased to be, so to speak, a contingency fund, or whether or not the contingency fund is only to be drawn upon, and therefore included in any certificates if, and when, the contingencies arise.

The plaintiffs were anxious for the determination as to what was the right view upon this point which I have sketched somewhat imperfectly, and they accordingly took out this originating summons to have it determined whether, upon the true construction of the contract, for the purpose of the payments to be made to the plaintiffs thereunder, the value of the work executed by the plaintiffs was to be ascertained by adding to the prices and rates set out in the bills mentioned in the second schedule a proportionate amount in each case of the sum therein referred to as "General contingencies, 10 per cent.," or, if not, how the value of the work executed by the plaintiffs was to be ascertained for the purpose aforesaid.

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On hearing that the summons had been taken out, a letter was written on behalf of the defendants stating that they thought the matter was not one which could be determined by the Courts, and they indicated that if they entered an appearance, it was to be without prejudice to their taking exception to the procedure that had been adopted. I refer to this only to deal with, and dispose of the second point. Afterwards, when the appearance had been entered, the summons for directions came before the Master. Apparently, when it was before him, although there was some little dispute which is revealed in the affidavits, an amendment was asked for by the clerk to the solicitors who appeared for the plaintiffs, and to that the clerk to the defendants' solicitors apparently acceded. But the question was when the amendment should be made, and it was not to be made until after the evidence was complete. That seems to have been really not much more than an act of courtesy, and it appears to me that in this case there is no ground for saying that the defendants had taken a step in the proceedings so as to disentitle them to make their application under s. 4 of the Arbitration Act, 1889. If a party does take what is treated as a step in the proceedings, he, by an act of volition on his part, abandons his right to apply to stay the proceedings under s. 4. We have been referred to a number of cases upon what constitutes a step, but it appears to me that in none of them was there such an overriding and definite statement of the position as there was in the present case, where the solicitors had already written to say that their undertaking to appear would only stand good if it was to be taken without prejudice to their rights which should arise. In my opinion, therefore, there is no ground in the present case for saying that there was a step which disentitled the defendants to apply for a stay of the proceedings.

On January 12 a notice of motion was given by the defendants to stay the proceedings on the originating summons on the ground that the matter was one which by the contract had to be determined by arbitration.

Sect. 4 of the Arbitration Act, 1889, is plain, that where

there has been a submission to arbitration, and an application is made to stay the proceedings, then the Court or a judge, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings. I think it was determined by this Court in *Hodgson* v. *Railway Passengers Assurance Co.* (1) that the meaning and proper interpretation of such a clause as that in the present case is that the Court has to be satisfied that sufficient reason exists why the matter cannot or ought not to be referred to arbitration, and that the burden lies upon the party who alleges it to show that such sufficient reason exists. The onus lies upon the plaintiffs of showing that the contract ought not to be carried out, which in clear terms has provided that any question in connection with the contract, or as to the construction or meaning of the contract, shall be referred to the decision of an engineer.

Applying the section, and treating the onus as lying upon the plaintiffs, I ask myself have the plaintiffs discharged that onus and shown a reason why the arbitration should not take place? It is said that the question raised is one of law, and that if the matter goes to arbitration it may have to come back to the Court for judicial interpretation of the meaning of this and other clauses of the contract. That may be so, but the clear and definite contract as made between the parties is that matters which fall within cl. 54 of the contract, as this matter does, are to go before an engineer arbitrator, an arbitrator of a particular character, and enjoying particular characteristics. It also appears to me that the Court would have to have some evidence before it, not merely of custom, but some evidence which would enable it to be properly equipped to determine what is the meaning of the words "General contingencies" and a number of other expressions which appear throughout the contract,

(1) (1882) 9 Q. B. D. 188.

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and which will probably be more perfectly known to the engineer to whom the parties intended to entrust the decision of their disputes. More than that, I think it will be necessary for certain facts to be found, because the Court could not give an expression of its opinion in the air.

Lawrence J. came to the conclusion he would make no order, guided in particular to that end by some observations which were made by Lord Parker in *Bristol Corporation* v. *John Aird & Co.* (1) It appears to me that Lord Parker was there speaking of arbitrations in general, and I do not think he was dealing with the particular class of arbitration with which we have to deal in the present case, where we have the possibility of a number of engineering questions arising and a contract between the parties by which they agree that all those questions shall be referred to a person qualified as an engineer. But if, as I think, Lawrence J. relied upon the observations of Lord Parker, he was in my opinion also bound to pay attention to the observations of Lord Moulton in the same case. Lord Moulton there says (2): "On the other hand for many years it has been recognised that there are cases in which a well selected domestic tribunal, in which the judge is one with a special acquaintance either with the facts of the case or with the subjects to which the litigation relates, may give more complete and speedier justice than the more elaborate procedure of the Courts of law (based as it is on the principle of complete independence of the tribunal from the parties, and the case itself), is ever in a condition to render." He makes other observations about the wisdom in these engineering contracts of appointing an engineer to decide questions, that it is a businesslike way of dealing with troubles which could probably be confined within a certain compass by a person who is a responsible engineer, far better than they could be in the Courts. He says (3): "There may be types of questions which, although included in the arbitration clauses, are types which presumably were not in the contemplation of the parties, and are not suitable from their

(1) [1913] A. C. 241, 261, 262. (2) [1913] A. C. 256.
(3) Ibid. 258.

nature to come before this domestic tribunal." When you are dealing with those, different considerations may arise. But if you are dealing with matters which are clearly, as the questions in this case are, within the intention of the arbitration clause, then the fact that a contract has been entered into must not be overlooked. It appears to me that this is in accord with what was said by Lord Selborne in *Willesford* v. *Watson* (1): "If parties choose to determine for themselves that they will have a domestic forum instead of resorting to the ordinary Courts, then since that Act of Parliament (i.e., the Common Law Procedure Act, 1854) was passed a primâ facie duty is cast upon the Courts to act upon such an agreement."

With all those authorities before me I think that one must see whether or not this onus has been discharged by the plaintiffs. I doubt myself, with all respect to Lawrence J., whether he has applied that rule, and I am of opinion that the onus has not been discharged. Moreover it appears to me that the difficulties which it is suggested will arise or may arise are probably somewhat fanciful. In *Rowe Brothers & Co.* v. *Crossley Brothers, Ld.* (2), which was cited to us by Mr. Owen Thompson, where the reference to arbitration was affirmed, Hamilton L.J. said (3): "Of course, Mr. Clavell Salter has rightly endeavoured to make the questions of law the most formidable part of the case, and reduce the questions of fact, if not to insignificance, at least to a seat in the background. But I am not able to believe that questions of law will be as formidable as he seeks to make out, and I am satisfied that for their proper comprehension a considerable familiarity with the plant and the facts is absolutely indispensable." That observation appears to me to apply also in the present case. I think it would be necessary to bring before the Court in the form of evidence a very considerable number of facts. The probability is that those facts can be ascertained with far less expense if the matter goes to the engineer who was by the contract to be the arbitrator between the parties, and

(1) L. R. 8 Ch. 473, 480. (2) 108 L. T. 11.
(3) Ibid. 17.

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I do not regard the case as one which presents a simple question of law, and law only, in the sense in which I gather the learned judge treated it as being.

For these reasons, although I should be the last to wish to overrule an act of judicial discretion on the part of Lawrence J., I am of opinion that he has gone wrong in not attaching sufficient weight to the question of onus. For these reasons the appeal must, in my judgment, be allowed with costs.

SCRUTTON L.J. This appeal raises a class of question which repeatedly comes both before the Chancery Division and the King's Bench Division.

It is becoming increasingly the practice to insert in contracts for the sale of goods, contracts for the charter of ships, contracts for insurance of all sorts, building contracts, and engineering contracts of all sorts, a clause by which the parties agree to refer all their disputes, or a certain class of them, to an arbitrator. It is also a very common practice for a party who has agreed to refer all his disputes to an arbitrator to say, when a question arises, that he would rather not do so, and to bring an action in the King's Courts. There usually follows, both in the Chancery Division and in the King's Bench Division, an application by the other party to the contract to stay the action on the ground that the parties have agreed to refer their disputes to a private arbitrator, and the decision to be come to by the Courts is often a matter of very considerable difficulty. It is still more difficult to lay down principles on which the Courts should proceed. On the one hand, it is eminently desirable, in all business matters, that parties who have made a contract should keep it. Business could not satisfactorily go on if persons were to be at liberty to disregard contracts they had made; but one cannot lay too much stress on that, because—I commend the observations to Mr. Dighton Pollock the next time he cites Lord Selborne—it has been pointed out by Lord Moulton in *Aird's* case (1), that inasmuch as everybody who makes

(1) [1913] A. C. 241, 258.

such a contract now knows that it is subject to the possibility of being controlled by the Courts, he cannot be said to break his contract because he insists, in the cases in which the Courts do not think otherwise, that the case should be heard in Court. But undoubtedly a guiding principle on one side, and a very natural and proper one, is that parties who have made a contract should keep it. On the other hand, the Courts have always firmly adhered to the principle that their jurisdiction is not to be ousted by agreement between the parties, and that in cases where the Courts think it better that the dispute should be decided by the Courts, rather than by a private arbitrator, they will not be fettered in their decision by the fact that the parties have agreed to oust the jurisdiction of the King's Court. I do not state the matter in any more detail, because it has always seemed to me, that Lord Moulton in his judgment in *Aird's* case (1) has said everything that could be said on the principles that should actuate the Courts in dealing with an application by one party to a contract to stay an action in the Courts on a matter which the parties have agreed should be referred to a private arbitrator. Parts of Lord Moulton's judgment, of course, are not relevant in this case, because in *Aird's* case (1) the reference was to the engineer under the contract, who, by the natural course of events, must already have formed opinions, and made decisions on the matters which were referred to him as arbitrator. But even in such a case, Lord Moulton points out (2): "The Court is bound to consider all these things; but in considering them it ought to hold that nothing known at the time of the contract, nothing fairly to be expected from the position of the engineer when he becomes arbitrator, can be alleged as a ground why it should not keep the parties to the bargain, because those things must be supposed to have been in their contemplation at the time when they entered into the contract." Having discussed in a short but, in my view, very valuable judgment, the various matters that the Courts would have to consider, he winds up in this way (2): "It (the Court) must consider all

(1) [1913] A. C. 241. (2) [1913] A. C. 258, 259.

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the circumstances of the case, but it has to consider them with a strong bias, in my opinion, in favour of maintaining the special bargain between the parties, though at the same time with a vigilance to see that it is not driving either of the parties to a tribunal where he will not get substantial justice."

I approach this matter from that point of view, with a strong bias in favour of maintaining the special bargain between the parties. I find that the parties were providing for the construction of a tube railway, a very special form of engineering, with a number of special matters connected with compressed air, and other technical matters; that they considered how they would settle disputes under the contract, and they provided that when any question should arise between the contractors and the company in connection with this contract, or as to the construction or meaning of this contract, the question at issue should be referred to the decision of an engineer; not the company's engineer; nor the engineer who is already concerned in the construction, but an independent engineer. They contemplated that the engineer would be the proper person to decide the construction or meaning of the contract. Why they used both the words "construction or meaning" I do not know. I hope it was not because they thought that the Courts that dealt with construction never got at the meaning, but at any rate, they used the words "construction or meaning," and they agreed that the questions of construction or meaning of the contract should be dealt with by an engineer, I think for the very obvious reason that they were dealing with a special subject matter, full of technical terms, and that they thought an engineer who was familiar with the subject matter was more likely to arrive at a speedy and quick decision than judges who were not familiar with the subject matter, and who might therefore have to have elaborate explanations given to them as to the meaning of the terms used. I start, therefore, as I have said, in considering whether an action brought to ascertain the construction or meaning should be stayed with, as Lord Moulton says, a strong bias in favour of maintaining the special bargain between the parties.

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One of the objections which I take to the judgment of Lawrence J. is that I do not think he has given sufficient effect to the express bargain between the parties that an engineer shall be the person to decide the construction of their contract. I quite agree with what has been said in numerous cases that the Court should not lightly interfere with the discretion of the judge, who has to hear the case in the first instance. I, personally, should never interfere with the discretion of a judge, except in cases where I could put my finger specifically on certain matters as to which I thought he had gone wrong.

This particular summons which it is asked to stay is taken out to determine the construction of a contract in a particular matter. This is what is called a "schedule of prices contract," a matter which would have to be explained to the judge, but with which an engineer is thoroughly familiar. It contains a provision that interim payments may be made amounting to 90 per cent. of the value of the work actually executed, prices according to a schedule. When one turns to the schedule, after the summaries of the prices according to schedule, there is a printed heading which has been filled in: "General contingencies 10 per cent." As I understand, the parties are fighting about this question, and I have not the slightest intention of expressing any opinion one way or the other as to which is right. I merely state the question, as I understand it. There are provisions in the bill of quantities for rates per yard, per foot, and so on. One side says that the actual value of the work done is to be measured by those rates. The other side says that to those rates is to be added 10 per cent. for general contingencies, whether any contingency is proved to have happened or not. I suppose the sort of argument is—and, again, I am not expressing any opinion whether it is right or wrong—that the 10 per cent. is a fixed sort of sum for which you take the chance of contingencies, and that if the contingency does not happen yet you may get the 10 per cent. I suppose it follows that if the contingencies exceed 10 per cent., if, for example, they amount to 20 per cent., you still only

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receive the 10 per cent. ; but no doubt the position has not been worked out to the extent of saying whether that argument will be put forward or not. The other side, as I understand, say that contingencies mean the things that may happen, and that the sum is to be paid if they do happen, and that the 10 per cent. is a maximum, and is not to be paid unless the contingencies do happen. I am not expressing any opinion as to which side is right, but I am quite confident of this, that an engineer is a much more suitable tribunal to decide that question than a judge. My own view is that no judge could decide this question without hearing evidence as to the meaning, in engineering contracts, of the term "contingencies," possibly also as to the meaning of "The value of the work actually executed" ; whereas I am equally confident that to an engineer of experience the solution of this question will present no difficulties at all.

I have already mentioned one matter in which I think Lawrence J. went wrong in not giving sufficient attention to the burden of proof, or the bias, as Lord Moulton calls it. Secondly, I think he overlooked the importance of the knowledge of fact which in my view is required to determine this question, which in my view is possessed by the engineer to whom the parties have agreed to refer the construction of the contract, and which is not possessed without evidence by the judge to whom otherwise the question would come. Thirdly, I think he went wrong in this, that towards the close of his judgment he says : "Here, as I have stated, the sole question is one of construction, and, therefore, what would happen, if the case went before the arbitrator, would be that either the arbitrator himself would state a case, or else the Court would, at the instance of either party, direct him to state a case." In my opinion, with respect, that is quite an erroneous view of what would happen. There will here very likely be no necessity for the arbitrator to state a special case at all. I think it is very doubtful whether the Court would or should order him to do so. It seems to me very unlikely that the arbitrator of his own motion would state a special case, because my strong impression is that

any engineer would find no difficulty with this question, whatever the judge might find with it. I have an uncomfortable sort of impression that if the arbitrator was ordered to state a special case he would do as many arbitrators do, state one of the parties completely out of Court by finding facts.

Those three matters that I have mentioned, upon all of which in my view the learned judge below took a wrong view, afford me a sufficient ground for what otherwise I should not do, interfering with what is prima facie the discretion of the learned judge before whom this application originally came.

I am going to conclude by saying what I began with—namely, that in my view it is of the greatest importance, unless you are otherwise obliged, to uphold the bargain which the parties themselves have made; and when the parties themselves have agreed to refer the construction of their contract to an engineer for what seems to me a very obvious reason, it requires in my view a very strong case to allow one of the parties to break his bargain to refer.

As regards the step taken, I agree entirely with what the Master of the Rolls has said. I think the preliminary letter prevents anything which might under other circumstances be considered a step from having that effect. One step will do, but when that one step is prefaced by a letter stating that it is done without prejudice to the objection that this proceeding ought not to start at all, and ought to be stayed, in my view the relevance of the step departs.

SARGANT L.J. On the minor point that has been raised here I agree with the judgment of the Court. I think there was here no step taken within the cases sufficient to prevent this motion to stay.

On the major point I have the misfortune to differ from my colleagues. I have been convinced by the argument of Mr. Owen Thompson for the respondents, and that conviction, although it may have been shaken, has not been displaced by the two judgments to which I have just listened.

It seems to me here that one ought to have, I will not say a strong bias, but a very strong inclination not to interfere

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lightly with a discretion which has been entrusted by the Rules to the judge of first instance, and in spite of the several matters to which Scrutton L.J. has referred as being matters of principle on which he can see that the learned judge has gone wrong, I do not myself think that those matters of principle do in fact emerge from the learned judge's judgment as it has been delivered. Here undoubtedly the main point at issue is one which turns on a very few words in one clause in this contract, although for the purpose of interpreting those words it may be necessary to look in some detail at a great many other parts of the contract. The point merely is this. The engineer has certified for, I think, some 279,000*l.* of work done as being 90 per cent. of the value of the work executed within cl. 43 of the contract. The question that arises is this: It being admitted that the certificates are based upon the prices named in the approximate bill of quantities, ought there to have been added to those prices for the purpose of applying the 90 per cent. principle the 10 per cent. which is added to the gross sum total of the contract when the lump sum comes to be stated. It seems to me that that is first and foremost a question purely and simply of the construction of this one clause of the contract, although it may be necessary for the purposes of determining it not only to look at the other parts of the contract, but to have some evidence as to the meaning of some engineering terms.

In answer to the affidavit stating that that was the point, there was an answer put in by Mr. Mitchell, which is quoted in the judgment of the learned judge, that it was to a great extent a question of fact, that is of the practice and custom of the engineering industry in connection with such agreements. The learned judge deals with that, and points out with regard to it that there may be great difficulty in deciding what evidence is admissible, and what evidence is not, and that the Court itself would probably be a much better judge of that than an engineer. He then estimates the probabilities that there will be, if the matter were sent to arbitration, of it at once, or nearly at once, coming back to the Court for the decision of the very question which is raised in these

proceedings. It may be that he has to some extent over-estimated the probabilities of that happening, but in my judgment it is a very likely thing to happen. I should think the strong probability is that, when the matter has been thrashed out before the engineer with evidence which may or may not be properly admissible as to what has been the practice and custom with regard to contracts of this kind, in one way or another that very question will be brought before the Courts as a question of law; and that the final determination of the matter will, so far from having been expedited, have been hindered and rendered complicated by the arbitration that has taken place. I must say for myself that the affidavit which was put in by Mr. Dalrymple-Hay with regard to the general custom and practice of the industry strengthens that apprehension, because he speaks of these two forms of contract as if they were forms of contract which were so definitely separated from one another, and so absolutely common, that you could show a general custom with regard to them which would be of value in their interpretation. I must say for myself that I think in complicated contracts of this kind, dealing with all sorts of small matters, it is exceedingly difficult for anybody to make out that there is any custom controlling the interpretation of these contracts which could be imposed upon the natural and proper interpretation of the contracts as they are written down and signed.

It has been suggested that the learned judge did not pay sufficient attention to the onus resting upon those who seek to escape from an arbitration clause of this kind; but I fail to find that in his judgment. It is quite true he has referred to a statement by Lord Parker, made obiter, but which undoubtedly expresses quite clearly and shortly the general practice of the Chancery Division that has obtained for a long series of years past. In those cases there was a special reference to arbitration, and there was a special reference which included an arrangement to arbitrate as to the construction of the document, yet there has been a general rule adopted that the Court may nevertheless consider whether

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it is better on the whole for the parties, when there is a mere question of law to be determined, that the arbitration should not go on, or rather, that the proceedings before the Court should go on and should not be stayed under the arbitration clause.

I do not find anything special in the circumstances of this case to differentiate it from the number of cases which were cited by Mr. Owen Thompson, in all of which that question of convenience has been determined, and has been determined, I think, having regard to the general principle that it was for those who sought to displace the arbitration clause to discharge the onus of doing so. In my judgment really here, in a matter where the discretion of the learned judge has been recognized in a long series of cases, we should be whittling down that discretion and introducing what is a new practice. I notice that in *Rowe Brothers & Co.* v. *Crossley Brothers, Ld.* (1), which has been referred to both in the argument and in the judgment, very great stress is laid upon the importance of recognizing the discretion inherent in the Court of first instance.

What the determination of the actual question may be of course I do not in the least foreshadow, and I do not even deal with the question of what I should have thought was the proper view to adopt had the matter come before me in the first instance. I take this view, that the learned judge on duly weighing the general probabilities of the case, and without, as far as I can see, infringing any question of principle, has come to the conclusion that this matter would be better and more expeditiously dealt with if the legal proceedings which have been commenced were allowed to go on. In view of that decision it seems to me there are no sufficient grounds before us for interfering with or modifying the exercise of his discretion.

Appeal allowed.

Solicitors for appellants: *Bircham & Co.*

Solicitors for respondents: *Batten, Proffitt, Scott & Weddell.*

(1) 108 L. T. 11.

W. I. C.

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[1925. B. 1495.]

Landlord and Tenant—Lease—Adjoining Landowner—Confinement of natural Stream in Culvert—Non-repair of Culvert—Damage to Lessee—Breach of Covenant for quiet Enjoyment—Omission of a Duty—Liability of Lessor.

In 1879 the owner of land, which was covered with slag and through which ran a natural stream, inclosed the stream in a culvert. In 1886 he granted to certain persons a lease for ninety-nine years of part of the land with the building on it, retaining the adjoining part through which the culvert ran. The foundations of the south wall of the building did not reach the soil, but rested on the slag. The lease contained an express covenant by the lessor for quiet enjoyment. In 1924 the culvert was in a bad state of repair, with the result that the stream broke through the culvert and scoured away the foundations of the south wall, so that it collapsed. At that time the lease was vested in the plaintiff, while the land under which the culvert ran and the reversion to the leased land, expectant on the determination of the lease, were vested in the defendant:—

Held, that confining the stream in an artificial structure incapable of retaining it was an act of the defendant, which had interrupted or disturbed the lessee's quiet enjoyment of the land, and that therefore the plaintiff was entitled to succeed on the ground of breach of covenant for quiet enjoyment.

Held, also, that the covenant was not confined to active disturbance of enjoyment, and that the omission to keep the culvert in repair was an omission of a duty by the owner to the adjoining landowner, which if neglected might cause damage to the adjoining property, and that the owner was therefore bound to prevent such damage by taking reasonable precautions.

Dicta in *Anderson* v. *Oppenheimer* (1880) 5 Q. B. D. 602, 607, 608 and *Cohen* v. *Tannar* [1900] 2 Q. B. 609, 614 followed.

Decision of Russell J., ante, p. 109, affirmed.

Appeal by the defendant from the decision of Russell J. reported ante, p. 109.

The facts are fully stated in the report of the case in the Court below and also in the judgment of the Master of the Rolls.

Preston K.C. and *G. D. Johnston* for the appellant repeated in substance the arguments used by them in the Court below.

G. B. Hurst K.C. and *H. Buckmaster* for the respondent were not called upon to argue.

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POLLOCK M.R. This is an appeal from a considered judgment of Russell J., given on November 20 of last year, whereby he held that the defendant was responsible to the plaintiff in respect of the cause of action sued upon, and directed an inquiry for the purpose of ascertaining the sum in respect of damages, which the plaintiff would be entitled to recover.

The matter arises out of a misfortune which happened in Wales, where, owing to a very considerable amount of rain that fell in December of 1924, a culvert gave way. It appears that during that month there had been a very heavy rainfall, and that on the night of December 22, or early in the morning of the 23rd, there was a very heavy storm, which put an additional strain upon the watercourses in the country after they had already been filled, and that the nature of the downfall of rain was such that it brought the quantum of water passing through this particular culvert up to about its centre. The learned judge has held, upon the evidence before him, that the downfall of rain did not constitute vis major, or an act of God, and, indeed, that such a downfall may be anticipated from time to time, and therefore that there was no excuse which could be relied upon by the defendant on such a ground.

The plaintiff is the assignee of certain premises, comprising a hall at Merthyr. The nature of the site is this: The hall is built upon what is really the side of a spoil bank, and is used by the plaintiff for meetings of the Salvation Army. By the side of this site so demised is a culvert, which carries the water of a stream through it. The lease was granted on October 20, 1886, to the predecessors in title of the plaintiff, and the defendant is, by a conveyance made in November, 1907, the lessor of the premises. The lease contains a demise of the part which is coloured pink upon the map indorsed upon it, and the part which is coloured blue represents the stream flowing in the culvert, that passes in and upon the land of the defendant. The culvert is situated in the land of the defendant, and with regard to that the lessees were granted a right to make use of or pass over this culvert, or the land

coloured blue, for the purpose of obtaining access to the hall. The terms of the grant were: "And lastly the said lessor hereby covenants with the said lessees that they the lessees may at all times during the said term of ninety-nine years use the piece of land on the south side of the said demised premises and which is coloured blue on the plan drawn on the back of these presents for the purpose of going to and from the vestry under the said demised premises and for which they the lessees shall pay to the lessor the nominal sum of one shilling per year." It is plain, therefore, that no part of the land coloured blue in which the culvert is built and the stream runs was demised to the plaintiff or his predecessor in title. The lease contains a covenant by the lessees to repair, that they will: "effectually and substantially maintain and keep the said premises with their appurtenances and also all buildings now or hereafter to be built thereon and all troughs, party walls, sewers, drains, watercourses, ways and other things not herein specified, or which may be necessary for the proper maintenance thereof, and the said demised buildings and appurtenances so in all things repaired maintained and kept and at the determination of the same term will quietly yield up."

After considering the arguments presented to us, I am quite satisfied that the covenant to maintain and the covenant to yield up do not include the land coloured blue. They are specific in respect of the land coloured pink, which alone was demised to the plaintiffs' predecessors in title.

What happened was this: when this flood occurred at the end of December, 1924, it appeared that a portion of the culvert gave way, and inasmuch as the wall of the hall had been built upon a spoil heap there was no sufficient restraining power, and water escaping from the culvert washed into the, I will not call them foundations, but the spoil heap, upon which the footings of the hall stood, and scoured them out, with the result that a certain portion of the wall fell, and the hall was as to part of its side very much injured.

The plaintiff brings this action against the defendant, and

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charges him with the responsibility for this misfortune. He says: "The defendant has failed and neglected to keep the said culvert under the defendant's land in proper or any repair by reason whereof very serious damage has already occurred to the plaintiff's premises"; and he claims an injunction and consequential relief.

The defendant says, first, "True, the site on which the culvert is built is my site, but it is impossible to know who built this culvert." There is some indication from a map which has been produced to us that the culvert was built a considerable time ago, in the seventies, and at a time before the hall was built. "But," says the defendant, "who built it, I do not know; no predecessor of mine built it, and I am not responsible in any way for it."

The learned judge has held upon the evidence that this culvert belonged to the defendant, and I think he was right in so holding. It appears to me that the defendant, who is the owner of the land or site upon which the culvert is built, in the absence of any particular explanation which would serve to excuse him from responsibility, must be made responsible for the culvert, and that the construction of the culvert must be attributed to him or his predecessors in title who owned the soil on which the culvert rests.

There is in the lease a covenant for quiet enjoyment, which is in these terms: "And also that the said lessees their executors administrators and assigns well and faithfully paying the said rents hereinbefore reserved and performing the covenants hereinbefore on their part and behalf to be paid and performed shall and may from time to time and at all times hereafter during the said term hereby granted peaceably and quietly have hold and enjoy the said premises hereby demised without interruption or disturbance by the said lessor his heirs and assigns or any other person or persons lawfully or equitably claiming or to claim by through or under them or any of them."

The learned judge in his judgment has come to certain conclusions of fact. He refers to and accepts evidence given by Mr. Marshall, a witness for the defendant, and says that

in answer to the question: "If there had been no flood, in your opinion would the culvert have been sound to-day?" Mr. Marshall said: "I could not say that, because it had practically come to its ultimate end, I should say, by reason of the wear and tear."

The learned judge further said: "I should myself have been prepared to hold that the omission to keep the culvert in a fit condition involved the omission of a duty to the adjoining landowner, and that it was the duty of the owner of this culvert, which, if neglected, might cause damage to the adjacent property of another, to prevent such damage by taking reasonable precautions." He quoted authorities in support of that proposition, and added: "If I am right in this view the plaintiff is entitled to succeed, not only on the ground of breach of covenant for quiet enjoyment, but also on the ground of derogation from grant."

Now, without saying more I think it is clear that the plaintiff is entitled to succeed on the ground of breach of covenant for quiet enjoyment. The way in which the answer to that is put is this. It is said by Mr. Preston, with force, on behalf of the defendant, that the defendant did not do anything himself; that there was no act on his part; and that the covenant for quiet enjoyment is that the lessees shall enjoy, without interruption or disturbance by the lessor; and that if you look in the books at cases that have been decided you will not find one in which the omission or the failure to do an act is treated as an interruption or disturbance. In all, or almost all, the cases it is some act on the part of the defendant which is found to be a breach of the covenant for quiet enjoyment. I do not think that the authorities go so far as Mr. Preston contends they do. It appears to me that we have here this simple case: The premises of the defendant adjoin and abut upon the plaintiff's; those premises of the defendant carry a culvert for the purpose of allowing a stream to run in it; and the land on which the culvert stands belongs to the defendant; the responsibility for maintaining the culvert must lie on the defendant. The defendant has granted to the plaintiff the adjoining premises,

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and has entered into a covenant with him for the quiet enjoyment of them.

After the findings of the learned judge, it appears clear that there was a failure or neglect on the part of the defendant to maintain this culvert. It was in consequence of the ordinary wear and tear that it got into "its emaciated condition." A culvert of that sort, by the lapse of time, would in the ordinary course perish, and, indeed, the statement by Mr. Marshall, to which I have referred, was that it had practically come to its ultimate end by reason of wear and tear. If, therefore, something happens in consequence of the culvert coming to its end owing to wear and tear, it appears to me that the defendant is responsible for failure to renew, or make good the culvert, as upon the evidence he could have done, if he had taken the trouble to do so.

There are only three cases to which I think I need refer. In *Sanderson* v. *Berwick-upon-Tweed Corporation* (1) the Court of Appeal held that there was no responsibility for a breach of covenant for quiet enjoyment in the circumstances of that particular case, but Fry L.J. in the judgment of the Court, which was delivered by him, says (2): "But it appears to us to be in every case a question of fact whether the quiet enjoyment of the land has or has not been interrupted; and where the ordinary and lawful enjoyment of the demised land is substantially interfered with by the acts of the lessor, or those lawfully claiming under him, the covenant appears to us to be broken."

Now Mr. Preston retorts: "Yes, that proposition may be quite good, but it refers to acts." There is, however, another case which to my mind is a sufficient authority, if authority be needed, that the covenant may be broken not only by acts of commission, but also by acts of omission. In *Anderson* v. *Oppenheimer* (3) the negligence on the part of the lessor had been negative. The injury happened in that case by the bursting of a pipe which had been placed in situ by the defendant, the lessor; but it was

(1) (1884) 13 Q. B. D. 547. (2) Ibid. 551.
(3) 5 Q. B. D. 602.

difficult to see it, and the jury found that the lessor had not in any way been negligent; that is to say, and I think that is what the finding amounted to, that he had in no way omitted what was part of his duty. Brett L.J., however, said (1): "After the lease had been granted, there was no breach of any duty, there was no act of either commission or omission and no negligence"—clearly indicating that in his mind the case was determined by reason of the full effect which was to be given to the answer of the jury, that the defendant had not been guilty of negligence, either of commission or omission. Cotton L.J. said (2): "I agree that an act of omission may be tantamount to an act of commission so as to be a breach of the covenant."

There seems to be good sense and reason for such a view. The duty on the part of the defendant would be to repair if he had put this culvert upon his land, or was responsible for the culvert which had been put upon his land for the purpose of carrying the water past the site of the hall leased to the plaintiff. There seems no logical or other reason for putting an act of omission into a different category from that of an act of commission, particularly where you find there was a duty which lay upon the person sought to be made responsible.

There is another dictum to the same effect in a later case of *Cohen* v. *Tannar* (3), where Vaughan Williams L.J. in speaking of the covenant for quiet enjoyment says (4): "There may, no doubt, be a breach of the covenant by an act of omission, but it must be the omission of some duty."

There seems, therefore, in *Anderson* v. *Oppenheimer* (5) and in the observations of Vaughan Williams L.J. in *Cohen* v. *Tannar* (6) to be authority, if authority were needed, binding upon this Court, that acts of omission stand in the same position as acts of commission.

The learned judge in the Court below has said that he would be prepared to find that there was an omission to keep the culvert in a fit condition, and that it was the duty of the

(1) 5 Q. B. D. 607.
(2) Ibid. 608.
(3) [1900] 2 Q. B. 609.
(4) [1900] 2 Q. B. 614.
(5) 5 Q. B. D. 602.
(6) [1900] 2 Q. B. 609, 614.

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owner of this culvert, which, if neglected, might cause damage to the adjacent property, to prevent such damage by taking reasonable precautions. I agree with that view. In my opinion that is perhaps the shortest and the most direct way of deciding this case. It appears to me that the case is one in which the defendant is responsible by reason of his omission to repair and maintain and keep in good repair the culvert, in consequence of which the stream was able to get at the premises of the plaintiff, and by that failure or omission the defendant has rendered himself responsible to the plaintiff for a breach of the covenant of quiet enjoyment.

On these grounds, I think that the appeal must be dismissed with costs.

WARRINGTON L.J. I am of the same opinion. The plaintiff is the lessee by assignment from the original lessees of a piece of land with a building standing thereon now used as a meeting house of the Salvation Army, under the defendant as the successor in title of the original lessor. On the southern side of the plaintiff's premises there was at the date of the lease, and still is, what is described in the lease as a piece of land coloured blue. That piece of land coloured blue is the result of certain work done in the years 1878 or 1879. That work consisted of substituting for the bed of the Morlais Brook a brick culvert some 7 feet 6 inches in diameter, constructed of three courses of ordinary bricks, of course taking a circular or cylindrical shape when completed; and those alterations consisted further in the filling in, partly with clinkers and partly with ashes and other substances, of the space between the culvert and on one side of the slope on which the plaintiff's building was built, and on the other side a retaining wall, so that there was a level space between the retaining wall and the wall of the plaintiff's building. But the material thing is that the alterations then made consisted in turning the bed of the brook into a piece of ground available for such purposes as a piece or strip of ground of that kind might be available.

The lease contained a covenant for quiet enjoyment, reading

it shortly, in these terms, that the lessees might "peaceably and quietly have hold and enjoy the said premises hereby demised without interruption or disturbance by the said lessor his heirs or assigns or any other person or persons lawfully or equitably claiming or to claim by or through or under them or any of them."

Now the question is really a question of fact: Whether what took place was an interruption or disturbance by the lessor who, of course, was the predecessor of the defendant, or any other person lawfully or equitably claiming or to claim by, through or under him, which, of course, would cover the present defendant.

What happened was this. On the night of December 23 and 24, 1924, there was a violent storm following several days of very heavy rain. The water in the culvert had increased from the normal, I think about six inches, to a depth of over three feet, practically half the capacity of the interior of the culvert. The result of that was that the culvert burst. The water was thereby allowed to reach the filling of clinker, and so forth, on which one of the walls of the plaintiff's building had been built, and the wall eventually collapsed. The question is whether that damage can properly be described as a disturbance by the present defendant. The learned judge has decided that what happened was an act done. I will take his exact words: "It can be truly said in this case that there was an act done by the defendant which caused the interruption or disturbance to the lessee's enjoyment," and this is the act—"namely, the confinement of the waters of the Morlais Brook in an artificial structure incapable of retaining them."

The first point that was taken by the appellant was that there was no such act done by the defendant, because the culvert was not constructed by the defendant, or there was no proof that the culvert was constructed by the defendant or his predecessor in title. In my opinion that contention wholly fails on the facts. The alteration from the bed of the stream to a piece of land was made at or about the same time that the local authority of Merthyr were constructing

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a culvert nine yards long in continuation of the culvert under the piece of land in question, in order to continue the road from the bottom of a street called Glebeland Place over the Morlais Brook. The only suggestion is that there was some evidence that the predecessor of the defendant only prolonged the culvert for about twelve yards from the point where the works of the Corporation ceased. Now there really is no evidence at all, but independently of that, on such statement as there is, which is really no evidence against the present plaintiff, or any support of the present defendant—even taking the statement, such as it is, as some evidence, I should come to the conclusion without the least hesitation that it is necessary to infer that some work like this was done either directly by the owner of the land, or with his consent or under his instructions. It is impossible that the owner of the land who stood by and saw somebody doing that which created a new piece of land for his advantage, and should afterwards be allowed to say that there was no evidence that such a thing was done with his consent or by his directions; again, when you come to the lease itself you find that he accepts this as a piece of land, and so describes it in the lease, and gives to the lessees a right of way over it as one of the approaches to the house they are going to build; and yet he says now, "I am not to be responsible for the conversion," in the manner I have described, "of this strip of land further than the twelve yards" to which I have referred. It seems to me quite hopeless, and I should be prepared to find as a fact, and I think the learned judge has so found, that the whole of this culvert was originally built by or under the instructions, or with the consent and approbation of the defendant's predecessor in title.

Having got as far as that, one has to consider this further point. An act done before the date of the covenant for quiet enjoyment does not constitute a breach of the covenant. As a general rule the covenant is with respect to future acts and not in respect of past acts. But what the learned judge has found, and I think he has found as a fact, is that the act of

the defendant which caused the overflow was not merely the construction of the culvert, but, as he says, it was the confinement of the waters of the Morlais Brook in an artificial structure incapable of retaining them. Now the confinement of the waters of the brook is a continuing act, and it becomes an act capable of being an interruption or disturbance of the tenant's enjoyment when that culvert becomes incapable of retaining the waters. The learned judge has, I think, quite plainly found, that though in the first instance the culvert may have been capable of retaining the waters of the brook, it had become in course of time incapable of so retaining them, and it was the fact that the culvert was at the time in question incapable of retaining the waters that was the essential characteristic of an act which formed the breach of the covenant. I will read only one passage of his judgment expressing his own finding, and two passages taken from the evidence of a witness for the defendant and set out in the judgment of the learned judge. The learned judge says: "In the course of time, however, the building settled somewhat, as was natural, having regard to the nature of the foundations. In the course of time also the culvert, owing to the constant weight and friction of the water which it carried, wore away. It had never been repaired, and I am satisfied that at the material time the westerly portion of the culvert under the green was in very bad repair." By "under the green" he means the green colour on one of the plans. Then after referring to the storm which I have mentioned, and to the rise of the water in the culvert, he says: "This was more than the culvert in its emaciated condition could bear. At its western end it collapsed, and its invert gave way, with the result that the Morlais Brook" undermined the foundation of the plaintiff's house. That seems to me to be a clear finding that the incapacity of the culvert to contain the increased quantity of the water in it as the result of the storm came not through an unforeseen or any extraordinary cause, but that it resulted from the constant weight and friction of the water carried by the culvert having worn it away. In other words, that it was

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the natural result of the non-repair at any time during forty-seven years which had brought about the disaster.

The two passages in the evidence bearing on this point were those which were quoted by the learned judge in his judgment. One is the statement of a witness that: "Undoubtedly the failure of the culvert which, to my mind, was caused through forty-seven years of water travelling through the culvert at the rate of eighteen feet per second and carrying with it débris of all descriptions—sand, grit, stone—and it has undoubtedly worn away the invert, which of course, supports the haunches, with the result that the haunches collapsed and the water spread under the foundations—the site of the culvert, the upper half." Then the same witness in answer to a question whether, if there had been no flood, would the culvert have been there sound to-day? says this: "I could not say that, because it had practically come to its ultimate end, I should say, by reason of the wear and tear." In my opinion those findings of the learned judge as to the condition of the culvert, and those items of evidence which I have read, are amply sufficient to support the judge's further finding that the culvert was incapable of retaining the waters of the Morlais Brook, and that the defendant had therefore committed the act of confining and keeping confined those waters in a culvert incapable of retaining them, and that that was the cause of the disaster. I agree with the learned judge that on those findings the disaster was an interruption by the defendant which was inevitable, and that that was a correct decision. I think also that if it had been necessary to decide it I should have further agreed with the learned judge when he says that he would be prepared to hold "that the omission to keep the culvert in a fit condition involved the omission of a duty to the adjoining landowner, and that it was the duty of the owner of this culvert, which, if neglected, might cause damage to the adjacent property of another, to prevent such damage by taking reasonable precautions." I think on the whole the authorities would support that ground of relief, also, but I prefer to put my judgment on the first point—

namely, that in the circumstances of this case there was an act such as the learned judge describes, which was in itself an interruption of the plaintiff's quiet enjoyment.

With regard to the other point as to the construction of the covenant to repair, I entirely agree with the view of the learned judge on that, and have no wish to add anything to the reasons expressed by him.

On the whole, in my opinion, this appeal fails, and must be dismissed.

SARGANT L.J. I am of the same opinion. The covenant on which the learned judge mainly relied is one between the predecessors in title of the plaintiff and the predecessor in title of the defendant respectively, and, of course, a covenant for quiet enjoyment is one which runs with the land, and the parties are now in the same position as the original lessor and original lessees would have been.

As regards the question of fact, I will only say this, that in my judgment the learned judge was fully justified in coming to the conclusion that the culvert in question had been constructed by the predecessors in title of the defendant, and also in coming to the conclusion that the failure of the culvert was due to the neglect of the defendant and his predecessors during a period of forty-seven years to take any step to repair the culvert and make good that necessary wasting of the structure of the culvert which was in the ordinary course of nature.

The first point which was taken by Mr. Preston was this, that inasmuch as the culvert had been constructed before the lease to the plaintiff's predecessors in title, and there had been no act on the part of the defendant or his predecessors in title since, there could not be a breach of the covenant for quiet enjoyment. It seems to me that that contention is really disposed of by the decision in *Sanderson* v. *Berwick-upon-Tweed Corporation*. (1) In that case the damages were claimed under two heads. Under one head the damage was disallowed, because something had

(1) 13 Q. B. D. 547.

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been done which was outside the authority given to the person who claimed the title under the defendant; but under the other head the damage was given, and it is with that part of the case only I am dealing. There the Corporation had constructed a system of drainage which was for the common benefit of two defendants, and they had demised the one tenement to one named Cairns, and had subsequently demised the other tenement to the plaintiff, and through the ordinary use in the authorized manner by Cairns of the tenement demised to him, together with the drainage system demised to him, a flood had occurred, and the land of the plaintiff had been damaged. In that case there had been no act done by the defendants or by their lessee Cairns, after the date of the demise to the plaintiff, except to use the drains that had been constructed; just as here there was no act by the defendant or his predecessors in title after the demise to the predecessors in title of the plaintiff, except to use the culvert that had then been constructed. But it was held that in respect to the second head of damage to which I have referred, the plaintiff was entitled to recover from the Corporation. It is made clear, I think, by the judgments of the Court of Appeal in *Harrison, Ainslie & Co.* v. *Muncaster* (1) and the subsequent case of *Anderson* v. *Oppenheimer* (2), that mere omission may, where there is a duty to do something, be sufficient to support an action of this kind. There is a passage in the judgment of Bowen L.J. in *Harrison, Ainslie & Co.* v. *Muncaster* (3): "It seems to me that we must confine this covenant within reasonable limits." It was a case in which they held, in all circumstances of the case, that there was not a sustainable claim. Then he says this: "I think that an interruption under such a covenant is not caused by the lessor or by those claiming under him, unless it is either a direct act of interruption, or unless it is some act of which it either was foreseen or ought by reasonable care to have been foreseen that the consequence in the particular case would be an interruption." There is

(1) [1891] 2 Q. B. 680. (2) 5 Q. B. D. 602.
(3) [1891] 2 Q. B. 680, 689.

a similar passage in the judgment of Lord Esher in that case, and again in *Anderson* v. *Oppenheimer* (1) Brett L.J. says (2): "After the lease had been granted, there was no breach of any duty, there was no act of either commission or omission and no negligence"—recognizing that the act of omission might be sufficient; and Cotton L.J. says (3): "I agree that an act of omission may be tantamount to an act of commission so as to be a breach of the covenant," and he holds in that case that there was no act of either commission or omission.

Now here the judge has found, and I think rightly found, that not only had there been this construction of the culvert by the predecessors in title of the defendant, but there had been an omission to take reasonable steps to keep the culvert in a proper state of repair, and adequate to keep the flow of water through it within the bounds of the culvert; and in that state of things it seems to me upon the authorities that, notwithstanding that what might be called the actual acts of construction were before the demise to the plaintiff, there was such a continuing use of the culvert by the defendant and his predecessors in title, and such an omission on their part to take reasonable steps to keep the culvert in a proper state of repair, that the defendant becomes liable under the proper construction of this covenant. It seems to me that there are probably one or two other grounds on which the defendant might be made liable, even if he had succeeded in escaping under the covenant as to quiet enjoyment, but taking the view I do of the results of that covenant, I think it unnecessary to deal with those other grounds.

As regards the covenant to repair, notwithstanding Mr. Johnston's ingenious suggestions, it appears to me quite clear that the covenant by the lessee to repair was only to repair that which was demised to him, and which he was bound to deliver up in repair at the conclusion of the lease; and it is also clear that the culvert itself did not form any part of what was demised to him, or any part of what he

(1) 5 Q. B. D. 602. (2) 5 Q. B. D. 607.
(3) Ibid. 608.

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had to give up in a state of repair at the termination of the lease.

I agree the appeal should be dismissed.

Appeal dismissed.

Solicitor for appellant: *E. A. S. Howell, for Simons, Smyth & Daniel, Merthyr Tydfil.*

Solicitors for respondent: *Ranger, Burton & Frost.*

W. I. C.

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In re AUTOMATIC BOTTLE MAKERS, LIMITED.

OSBORNE *v.* AUTOMATIC BOTTLE MAKERS, LIMITED.

Company—Debenture Trust Deed—General Floating Charge on Undertaking and Assets—Power reserved to create such Charges as the Company should think proper upon specified Property in ordinary Course of Business—Creation of second floating Charge on Part of specified Property in Priority to first Charge—Validity.

Where a debenture trust deed, creating a general floating charge over all the undertaking and assets of the company both present and future, reserves power to the company in the ordinary course of its business to create specific charges over any of those assets, then although a second general floating charge over all the property comprised in the first charge but ranking pari passu with or in priority to that charge, is, under the general law, incompatible with the first charge and ranks subject to it, yet there is no principle of law which forbids the creation of a second floating charge over part only of those assets ranking pari passu with, or in priority to, the earlier floating charge, so long as the later floating charge is within the limits of the power reserved.

A debenture trust deed created a general floating charge over all its undertaking and assets both present and future, but reserved to the company power to create in priority to that charge such mortgages or charges as the company should think proper "by the deposit of any dock warrants, bills of lading, or other similar commercial documents, or upon any raw materials, or finished or partly finished products and stock for the purpose of raising moneys in the ordinary course of the business of the company." In pursuance of the power and in the course and for the purposes of its business, the company raised 12,000*l.*, and secured payment thereof by charging all the before-mentioned documents, material and stock, both present and future, by way of a floating security to rank in priority to the floating charge created by the trust deed:—

Held, that the power reserved to the company, except as to subject

matter and purpose, was unlimited; that it enabled the company to choose the form of a floating charge, if required, and that the second charge was valid and entitled to priority over the first charge.

In re Benjamin Cope & Sons, Ld. [1914] 1 Ch. 800 explained and approved.

APPEAL from a decision of the Vice-Chancellor of the County Palatine of Lancaster.

The above named company was incorporated in January, 1923, for the purpose of acquiring and carrying on the business of glass bottle manufacturers and makers of and dealers in all kinds of glassware.

In January, 1925, the company issued a series of debentures for an aggregate sum of 50,000*l.* and executed a trust deed dated January 15, 1925, for securing the same, whereby the company created a specific mortgage in favour of the trustees upon certain freehold property and in addition a general charge on its undertaking and assets. The material clauses referring to this general charge were :—

Clause 6 : " The company hereby charges in favour of the trustees its undertaking and its other assets for the time being both present and future with the payment of the debentures and the interest thereon and premiums and all other moneys intended to be hereby secured and such charge shall be a floating security and accordingly shall in no way hinder or prevent the company from selling alienating leasing paying dividends out of profits or otherwise disposing of or dealing with such assets in the ordinary course of its business and for the purposes of carrying on the same. Provided always that the company is not to be at liberty save as hereinafter provided or except in accordance with the provisions of these presents to create any mortgage or charge on such assets ranking pari passu with or in priority to the charge hereby created."

Clause 7 : " The company shall be at liberty to create such mortgages charges or incumbrances as the company shall think proper upon such property and for such amounts and purposes as are next hereinafter mentioned (but not for any greater amounts or for any other purpose) that is

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to say: (*a*) Upon any lands or buildings and their appurtenances agreed to be acquired by the company after the date of these presents for such amounts not exceeding the cost thereof and for such purposes as the company shall think proper; or (*b*) Upon any undertaking hereafter to be acquired by the company or upon the securities or shares of any such undertaking for the purpose of acquiring any hereditaments fixed plant machinery or trade fittings or furniture or for the purpose of rebuilding or (with the consent of the trustees which shall not be unreasonably withheld) for the purpose of improving any buildings for the time being owned by the company or for the purpose of securing bank loans or overdrafts obtained for the purposes specified in this clause or any of such purposes. (*c*) By the deposit of any dock warrants bills of lading or other similar commercial documents or upon any raw materials or finished or partly finished products and stock for the purpose of raising moneys in the ordinary course of the business of the company."

Purporting to act upon the liberty conferred by cl. 7, sub-cl. (*c*), the company executed a debenture on August 11, 1925, in favour of trustees for its bankers, Williams Deacons Bank, Ld., for the sum of 12,000*l.* and interest. By that document the company charged with the said sum of 12,000*l.* and interest all its dock warrants, bills of lading or other similar commercial documents, raw materials, finished and partly finished products and stock, both present and future, and by the conditions forming part of the debenture it was provided amongst other things as follows: "This debenture is issued in pursuance of the power in that behalf given to the company by clause 7 (*c*) of an Indenture (hereinafter called 'the trust deed') dated the 15th day of January, 1925, and made between the company of the one part and Frederic Bury Osborne and James Blakey of the other part and is to secure the sum of 12,000*l.* and interest and is to be a first charge on the dock warrants bills of lading or other similar commercial documents raw materials finished and partly finished products and stock of the company both present and future and such charge is to rank in priority in all respects

to the floating charge created by the trust deed and to the debentures for the time being thereby constituted and secured and is to be a floating security."

Of the sum of 12,000*l.* secured by this debenture two sums of 5000*l.* had already been advanced on July 7, 1925, and July 23, 1925, by a company called the Parent Trust and Finance Co., Ld., in contemplation of the loan from the bank and on an undertaking by the company to repay the sum out of the proceeds of the loan. These sums were duly repaid accordingly. The loan from the bank was guaranteed by the Parent Trust and Finance Co., Ld., who paid to the bank all moneys due to it and took a transfer to themselves, or to trustees for them, of the debenture, and they were now entitled to the benefit of the security thereby created.

The security created by the trust deed having become enforceable the present action was begun on August 17, 1925, by the trustees of the trust deed of January 15, 1925, for the realization of their security, and on August 19 a receiver was appointed in the usual form, the order being originally made ex parte as a temporary order and afterwards as a permanent order on August 25, 1925. Judgment in the action was obtained on August 26, 1925. A creditors' petition for winding up was presented on the same day, and the company had since been ordered to be wound up.

On October 15 the present appellants, the Parent Trust and Finance Co., Ld., served upon the plaintiffs in the action and the official receiver a notice of motion asking for a declaration that the applicants, the present holders of the debenture of August 11, 1925, were entitled to a charge upon the raw materials, finished and partly finished products, and stock of the defendant company in priority to the charge of the plaintiffs, and for consequential relief.

The motion was heard on December 5, 1925, by the Vice-Chancellor who, after consideration of the evidence and hearing the examination and cross-examination of the witnesses, found in favour of the applicants that the charge in

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question had been created for the purpose of raising money in the ordinary course of the business of the defendant company, but, upon the question of law arising upon the construction of the trust deed, he decided that the charge in question was not within the class of securities authorized by cl. 7 of the deed, and refused the motion.

The applicants appealed against the latter part of the Vice-Chancellor's decision.

The appeal was heard on January 13 and 14, 1926.

Grant K.C. and *John Bennett* for the appellants. This second debenture was given by the company in its ordinary course of business. The Vice-Chancellor came to that conclusion on the evidence, and there is no appeal from his decision on that question. We are appealing from his decision that as a matter of law this debenture could not be granted. That question turns on the construction of the trust deed. It has never been decided that a company in the ordinary course of its business cannot deal with a particular class of its assets so as to give a floating charge over them. The charge is made a floating charge for the advantage of the mortgagor and in the interest of the company; otherwise if the charge were made specific the company would lose control of its property and its business would be brought to a stop. In this case the company was at liberty to create such a charge as it should think proper on any raw material and finished or partly finished products, and so long as the money was raised bona fide and was used for the benefit of the company, there is no general principle of law involved, but merely a question of construction of this particular deed. We submit that the company had power to create this charge as a floating charge on the assets in question and that the charge is good and entitled to priority over the first debenture issue.

Cyril Atkinson K.C. and *J. M. Easton* for the respondents. A floating charge on the property and undertaking of the company leaves the company free to charge specific property in the ordinary course of its business: *In re Hamilton's*

Windsor Ironworks (1); *Governments Stock and other Securities Investment Co.* v. *Manila Rly. Co.* (2); Buckley on the Companies Act, 10th ed., p. 242; but it is clear that apart from any words in the debenture, a company which has issued one floating charge on its assets cannot issue another; *Smith* v. *English and Scottish Mercantile Investment Trust* (3); *In re Benjamin Cope & Sons, Ld.* (4), which latter case shows that a company cannot, in the absence of very clear words, issue a second floating charge to have priority to, or to rank pari passu with, another floating charge already created. The property charged by the trust deed in favour of the first debenture issue extends to assets both present and future, but in cl. 7 (*c*) the words are very different, and do not extend to "present and future" assets.

[SARGANT L.J. *In re Benjamin Cope & Sons* (4), dealt with a case where universal floating charges were in competition. It did not decide that if there was a universal floating charge there could not also be a floating charge on a specific part of the assets and any assets substituted for them, ranking pari passu with or in priority to the earlier charge.]

In *In re Yorkshire Woolcombers' Association Ld.* (5) a charge on present and future book debts was held to be a floating charge, the creation of which, in priority to the debentures, was not authorized by the debenture trust deed, and being also unregistered was void.

Clause 7 (*c*) must be read as a whole and not split into two parts; it only authorizes the raising of money in the ordinary course of carrying out commercial transactions, and the money must be raised as part and parcel of the transactions then going through. Raising money generally in order to tide over a difficulty would not be covered by the words. Moreover, dock warrants and bills of lading can, from their nature, be the subject of a specific charge only, and it would seem to follow that the charge on raw materials, products

(1) (1879) 12 Ch. D. 707.
(2) [1897] A. C. 81.
(3) [1896] W. N. 86.
(4) [1914] 1 Ch. 800.
(5) [1903] 2 Ch. 284; [1904] A. C. 355.

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and stock must be specific also; and that would negative the creation of a floating charge.

Grant K.C. in reply.

Cur. adv. vult.

Jan. 27. POLLOCK M.R. stated the facts and continued: The question to be determined in this appeal is whether the company had the power to issue such a debenture in view of the restrictions imposed upon it by clauses 6 and 7 of the trust deed. It is a question of the right construction of the proviso to cl. 6 and the terms of cl. 7, and in particular its sub-cl. (*c*).

Both debentures are floating securities: and it is argued that to issue another debenture similar in character to that prior in date is in effect to undermine and to destroy the benefit of the charge created by the earlier security, and that if successive debentures were issued of a like nature, all the property charged under the first debenture might be, piece by piece, removed. In support of this argument reliance is placed upon a decision given by Sargant L.J., as a judge of first instance, in *In re Benjamin Cope & Sons* (1), where he decided that a company after making its bargain with the first debenture holders cannot give a charge over the same assets which puts later charges on a similar or a prior footing to those who already have their charge. There is no doubt force in this argument, but we have to consider the effect of the exception made in terms to cl. 6 of the trust deed.

No doubt it was realized that in the course of carrying on its business, which the floating charge of January 15, 1925, was intended to enable it to do, the company might find it necessary to raise money in particular transactions. Hence the exception to cl. 6 and the provisions made in cl. 7.

Those contained in sub-clauses (*a*) and (*b*) refer to particular acquisitions which might in ordinary course require the company to raise money for their completion. Similarly in sub-cl. (*c*) the deposit of dock warrants, bills of lading and other commercial documents is contemplated as an operation

(1) [1914] 1 Ch. 800.

common in the ordinary course of a mercantile transaction. There follow the words, "upon any raw materials, finished or partly finished products," etc., which may involve a lock up of present assets, and the company may need to charge them if its business is not to be brought to a deadlock. The purpose of making a charge a floating security is to enable the company to carry on its business in its ordinary way: see *Illingworth* v. *Houldsworth* (1), and the powers of a trading company include the power to mortgage by deposit, and a mortgage to debenture holders does not prevent a valid charge from being given on a specific asset. In the present case it appears clear from the terms of clauses 6 and 7, and especially the opening lines of cl. 7, that the company was to be free to create charges of any nature that it thought proper upon the classes of assets mentioned in sub-cl. 7 (*c*) for the purpose of raising moneys in the ordinary course of business. The Vice-Chancellor's judgment appears to hold this power to be limited to raising money upon, and in close relation to, the assets charged, and by a specific as opposed to a floating charge upon them. This interpretation would hamper the company's activities, and render it impossible to raise money, which may be as vital to its existence and continuance as the particular sale or purchase transaction in respect of which he thinks that a specific charge may be given: such as for the payment of wages or rent, the purchase of coal, or the payment for the electric current required to keep the furnaces and power in operation. A glance at the cash summary, July 7 to 31, 1925—being exhibit "C" to an affidavit before us—will show the cogency of these matters. The need of the company, if it is to carry on its work which results "in finished or partly finished products and stock," is as great under the latter head as under the earlier. I cannot see any need to restrict the interpretation of sub-cl. (*c*) as suggested. The covering words in cl. 7 give the company "liberty to make such mortgages charges or incumbrances as the company shall think proper." I cannot read these wide words as restricting their discretion to specific charges only

(1) [1904] A. C. 355.

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as opposed to floating charges. The whole purpose of the exceptions in clauses 6 and 7 is to give latitude to the company to carry on its business, while the decision given restricts that latitude; and by restricting the exception to specific charges on specific goods, lays down a narrow course for the company to follow which would deprive it surely and increasingly of any means to raise finance for its source of power and primary needs.

The argument for the respondent appears to be based upon a reading of the decision of Sargant J. already referred to, which it does not bear. There was not in that case an exception in respect of particular securities, but the charge was upon the same securities as those already subject to the earlier debenture. The Vice-Chancellor's decision does not in my opinion give sufficient effect to the terms of cl. 7, which appears to have been carefully drawn to meet the necessities of the company within limits allowed by law.

The appeal will be allowed with costs here and below.

WARRINGTON L.J. In January, 1925, the defendant company issued a series of debentures for an aggregate sum of 50,000*l.* charged by way of floating security upon the undertaking and assets of the company.

In August, 1925, the company created a single debenture for 12,000*l.* charged by way of floating security upon a specific part of its assets, and gave to this debenture priority over the original series of debentures. The question in this appeal is whether the provision as to priority was effective. The question turns upon the true construction of the trust deed and in particular on clauses 6 and 7 thereof, by the latter of which express power was conferred upon the company of creating such charges as are therein mentioned to rank in priority to the debentures for 50,000*l.* The learned judge has decided against the contention of the holders of the debenture for 12,000*l.*—hence this appeal.

The facts are as follows. [His Lordship stated the facts as above set out and continued:] Before the learned judge the appellants' claim was resisted on two main grounds. First,

that the security in question was not within the class of securities authorized by cl. 7 of the trust deed according to its true construction, and, secondly, that, even if it were, the charge was not created for the purpose of raising money in the ordinary course of the business of the company. The first contention obviously raises merely a question of law depending upon the true construction of the deed. The second is, in the main, a question of fact, though the precise meaning of the words "in the ordinary course of the business of the company" may be a question of law. This point has been decided by the Vice-Chancellor in favour of the appellants after consideration of the evidence and hearing the examination and cross-examination in open Court of some of the witnesses. I will assume that "in the ordinary course of the business of the company" should be construed in a commercial sense, that is to say in the ordinary course of carrying on the manufacturing and commercial transactions the object of its incorporation, but construing the words in this narrow sense I am clearly of opinion that the finding of the Vice-Chancellor was right. It is made quite clear, especially by the document being exhibit "C" to an affidavit of Mr. George Du Cros of November 5, 1925, that the money was required for and was expended in the discharge of current business liabilities of the company. The learned judge has found, and this as a pure question of fact, that the transaction was a bona fide one, and there is no reason for interfering with his finding. This point of attack therefore fails.

I now turn to the construction of the deed. It is, of course, well settled that by creating a charge upon its assets generally by way of floating security the company is not, in the absence of any stipulation to the contrary, prohibited from creating specific charges on specific portions of its assets in the ordinary course of business, as otherwise it would be prevented from effectually carrying on that business the carrying on of which was contemplated by the parties to the security. Clauses 6 and 7 of the trust deed have the effect of excluding this rule of law so far as mortgages or charges are concerned except

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as provided by cl. 7, and thus to allow and allow only, in priority to or pari passu with the debentures, charges created in accordance with such provisions.

I now turn to the material words of the clause. It gives liberty to the company to create such mortgages, charges or incumbrances as the company shall think proper upon such property and for such amounts and purposes as are next thereinafter mentioned, but not for any greater amounts or for any other purpose, and then provides by sub-cl. (*c*) that the permitted charge may be effected by deposit of commercial documents or upon any raw materials or partly finished products or stock for the purpose of raising money in the ordinary course of the business of the company. In my opinion the true effect of this provision is that the form and nature of the charge are, by the force of the expression "such charges as the company shall think proper," left to be determined by the company, the subject matter of the charge and the purpose for which the money is raised being determined by the provisions of the clause. In the present case the subject matter of the charge is raw materials, finished or partly finished products and stock, and its purpose that of raising money in the ordinary course of the business of the company. It seems to me, therefore, that it is clearly within the clause unless some good reason is given for excluding it. The only reason suggested other than the one I have disposed of is that it is a floating security. With all respect to the learned Vice-Chancellor I cannot see the force of this objection. The authority given to the company, except as to subject matter, amount and purpose, is unlimited, and I can find no good reason in the absence of express words to that effect to limit it in the way suggested. It is true that the commercial documents cannot be made the subject of a floating security because they have to be actually deposited, but I cannot see why by construction the same disability should extend to the other subject matters which are in themselves exempt from it. It has, indeed, been contended that the true meaning of the clause is to authorize only such securities as but for the general prohibition contained in cl. 6 would have

been allowed under the general rules relating to floating securities, and it is further contended that no floating security, although on a portion only of the assets, would be allowed. The answer is, in my opinion, first, that there is no reason to be found in the expressions used for any such limitation of the company's authority, and to act upon the assumption that the parties so intended would be to act on a mere guess. The parties had excluded the general rule so far as charges are concerned and were making a special bargain. To interpret this we must simply ascertain the meaning of the words used, and as to this I have already expressed my opinion.

But in my judgment there is no authority for the proposition that no floating charge, though upon a part only of the assets, would be allowed under the general law, and I am not prepared so to hold without authority. The only authority on which the respondents rely is the case of *In re Benjamin Cope & Sons* (1), but in that case the subsequent charge was a charge of the same nature and over the same property as the original charge, that is to say, a floating security on the whole undertaking and assets of the company, and what the learned judge determined was that such a charge, comprising as it did the identical property covered by the original charge, was not authorized by a provision in the trust deed authorizing the company in the course of its business and for the purpose of carrying on the same to deal with its property as it might think fit, and in particular to sell and mortgage the same or any part thereof. I think the learned judge makes it quite clear that it was the fact that the charge in question covered the whole of the property included in the original charge which, in his opinion, prevented it from ranking pari passu with the latter: see particularly the passage (2) beginning "And, generally speaking, it would in my view be as incompatible with the company's bargain with the first debenture holders to put their debentures behind or on the same footing as subsequent debentures giving a charge of the same character as if the debentures

(1) [1914] 1 Ch. 800. (2) Ibid. 807.

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had constituted a specific charge and it were then attempted to create a subsequent specific charge ranking pari passu with them or in priority to them." He is comparing one pair of charges with another pair, and saying they are on the same footing in respect of the point in question. There would be no point in this comparison unless the properties comprised in each of the first pair were identical with each other, as it certainly is in the case of the second pair.

On the whole I am of opinion that the appeal should be allowed.

SARGANT L.J. The first objection to the appellants' security, and that which has been accepted by the learned Vice-Chancellor, is that on the true construction of the trust deed of January 15, 1925, cl. 7 does not authorize a mortgage or charge by way of floating security on the company's dock warrants, bills of lading, or other commercial documents, raw materials, finished and partly finished products, and stock, present and future. To determine this question it is essential in the first place to examine and interpret the terms of the trust deed itself. It is only after this has been done that it is permissible to refer to or consider the authority of any reported case.

Now, on taking this step, it is obvious that cl. 7 of the trust deed is an independent, substantive clause, not merely operating by way of exception to the proviso to cl. 6, but applying to the whole of that clause; and that the purpose and effect of cl. 7 are to reserve to the company a power with regard to certain classes of its property to create incumbrances in priority to the general floating charge given by cl. 6 on the whole of the undertaking and property of the company. Any such prior charge can only be given on the particular classes of property mentioned in sub-clauses (*a*), (*b*) and (*c*) of cl. 6, and are not to be for any greater amounts or for any other purposes than those respectively specified in those sub-clauses. But, within these limits, the mortgages, charges or incumbrances may be such as the company shall think proper. And it is not immaterial at this point to

make two observations. In the first place the classes of property that may be charged are portions only of the property of the company, and do not include the general undertaking or goodwill of the company, or such valuable classes of property as the machinery or tools used in the company's business, or the book debts for the time being owing to the company. And in the next place the object of cl. 7 obviously is to enable the company to give a good title to third parties—namely, intending mortgagees or chargees—and the terms of the power should not be read in an unduly restricted spirit, or otherwise than in accordance with the ordinary commercial meaning of the words used.

If then the matter is regarded on these lines, is there any valid objection to the form or effect of the debenture of August 11, 1925? The assets comprised in it are precisely those mentioned in sub-cl. (*c*) of cl. 7 of the trust deed as assets which may be charged by way of prior security. And I can see no prima facie reason to doubt that the words of cl. 7, giving the company power to create such mortgages, charges or incumbrances as it should think proper, enabled it to choose the form of a floating charge, should that be the form that it should find suitable to satisfy an intending mortgagee. Indeed in the case of such essentially fluctuating property as raw materials or finished or partly finished products and stock it is difficult to see how any effective charge could be given in any other form without paralysing the business of the company. And it is to be noted that the same result would obtain if under sub-cl. (*b*) it were desired to give a charge on any undertaking thereafter acquired by the company; for such a charge must almost necessarily be of a floating character.

No doubt a particular dock warrant or bill of lading as representing specific goods is often deposited with or left in the hands of bankers or discounters as a security for moneys paid or advanced in regard to those specific goods; and it was sought to use this as an indication that the raw materials and other assets mentioned in the latter part of sub-cl. (*c*) could only be dealt with by way of a similar specific charge.

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But in my judgment this argument is unsound, as ignoring the discretion as to the form of charge expressly given by the initial words of cl. 7, and also as failing to recognize that under sub-cl. (*b*) also two classes of security can be given—first, specific charges on the securities or shares of undertakings acquired by the company, and, secondly, a floating charge on the undertakings themselves. And, further, the argument when closely examined appears to involve the limitation of each charge to the amounts required to finance the particular transaction with regard to the goods comprised in the charge; and was, indeed, carried to this extent in the argument of counsel for the respondents. But I cannot think that this is so, or that under the terms of sub-cl. (*c*) the company could not make a general charge to bankers or discount houses on the dock warrants or bills of lading for the time being in their hands to secure the general balance from time to time due from the company. The contrary view is too rigid and inelastic for the ordinary purposes of commerce. For smooth working, it seems to me essential that the power to charge should enable a general charge on the property represented by the documents from time to time in the hands of the company's bankers. And in my view this is even more clearly the case with regard to the materials and stock from time to time in the possession of the company. For otherwise it would be necessary to take stock at very short intervals, and to give a fresh substituted charge after each stocktaking.

Great stress has, however, been laid for the respondents on a decision of my own as a judge of first instance in *In re Benjamin Cope & Sons* (1), and it has been argued that that case decides that a general floating charge is necessarily incompatible with the subsequent creation under a special charging power of a floating charge to rank in priority to or pari passu with the earlier floating charge. I have examined that decision with great care, and have no reason to think that it was wrong, particularly in view of the fact that it appears to be in accord with an earlier decision of Vaughan-

(1) [1914] 1 Ch. 800.

Williams J. in *Smith* v. *English and Scottish Mercantile Investment Trust* (1), and not to have been questioned since. But the facts in that case were very different. There the original charge was on the whole undertaking and property for the time being of the company, and the reservation of a power to mortgage was in quite general terms; and it was held that such a power could not have been intended to authorize a competing charge upon the entirety of the property comprised in the earlier charge. Here the reservation of the power to mortgage is precise and specific in its terms, and extends only to certain particular classes of the property of the company.

The second objection raised by the respondents to the appellants' mortgage was that it was not effected for the purpose of raising money in the ordinary course of the company's business. This objection was overruled by the learned Vice-Chancellor, who had the advantage of seeing the witnesses on what was to a great extent a question of fact, and was satisfied as to the general bona fides of the transaction. The circumstance most pressed on us was the close proximity of the date of the appellants' mortgage to the date of the appointment of the respondents' receiver. But it is clear that the appellants' mortgage was given in pursuance of an arrangement made several weeks earlier, when the appellants made their first advance of 5000*l*. And though no doubt the company was in pressing need of money, this was precisely the reason why it resorted to its power of further mortgaging. Such a power is obviously superfluous in prosperous times, and to deny a resort to it in times of stress would deprive the power of most of its value. Nothing in the cross-examination that was called to our attention was sufficient in my judgment to displace the statement of Mr. George Du Cros, the chairman of the company, in para. 7 of his affidavit: "I wish to make it quite clear that at this time I believed the company to be entirely solvent and I believed that the advance in question would enable the company to carry on comfortably and to meet its obligations

(1) [1896] W. N. 86.

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as they fell due and I believed that the company had very good prospects indeed."

In my judgment the appeal should be allowed with costs here and below.

Appeal allowed.

Solicitors for appellants: *Guedalla, Jacobson & Spyer.*

Solicitors for respondents: *Hedley Norris & Co., for Vaudrey, Osborne, & Mellor, Manchester.*

R. M.

EVE J. 1926 — *Feb.* 9.

In re HAWKINS.

HAWKINS *v.* DEW AND SONS.

[1925. H. 3895.]

Education—Death Gratuity to legal personal Representative of deceased Teacher —Primarily available for Creditors—School Teachers Superannuation Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 55), *ss.* 3, 7, *sub-s.* 2; 8, 18.

A death gratuity granted by the Board of Education under the power conferred by s. 3 of the School Teachers Superannuation Act, 1918, to the legal personal representative of a deceased teacher, who died intestate and insolvent, leaving a widow and an infant daughter, will be treated as forming part of the estate of the intestate, and be primarily applicable in payment of the intestate's debts, and ought not to be held upon trust for his next of kin.

ADJOURNED SUMMONS.

The plaintiff, Ada Hawkins, was the widow of George Hawkins, who for some years before his death had been the headmaster of the Heyford elementary school in the county of Oxford, and thus a "teacher" within the meaning of the School Teachers Superannuation Act, 1918. He died intestate and insolvent on May 6, 1925, leaving the plaintiff and one daughter, an infant of seventeen. The intestate's estate was sworn at 148*l.* 10*s.*, but in fact only realized about 100*l.* Under the powers conferred by s. 3 of the above mentioned Act a death gratuity of 330*l.* was granted by the Board of Education to the plaintiff as the legal personal representative of the deceased teacher. The debts of the

intestate amounted to 309*l.* 13*s.* 5*d.*, of which 102*l.* 10*s.* 2*d.* was a debt owing to the defendants, Dew & Sons.

On January 27, 1925, an originating summons was issued on behalf of the plaintiff to determine the question whether the 330*l.* ought to be treated as forming part of the estate of the intestate so as to be available to answer the claims of his creditors, or whether such sum was to be held by the plaintiff free from any claims of the creditors in trust for herself as to one-third and as to the other two-thirds in trust for her child.

R. M. Pattisson for the plaintiff. This death gratuity does not form part of the intestate's estate for all purposes. The sections of the Teachers Superannuation Act bearing on the question raised by this summons are ss. 3, 7, 8, and 18 (1),

(1) The School Teachers Superannuation Act, 1918 (8 & 9 Geo. 5, c. 55), provides as follows:—

Sect. 3, sub-s. 1: "Subject to the provisions of this Act (including any rules made thereunder), the Board may grant to the legal personal representatives of any teacher who has been employed in recognised service for a period amounting in the aggregate to five years, of which not less than the prescribed part has been subsequent to the commencement of this Act, and dies while in recognised service, a death gratuity of an amount not exceeding the average salary of the teacher, or the amount of the additional allowance which the Board might have granted to him, if, at the date of his death he had become prematurely incapable of serving effectually as a teacher in recognised service, whichever is the greater."

Sect. 7, sub-s. 2: "Every assignment of or charge on and every agreement to assign or charge any superannuation allowance or gratuity shall be void, and on the bankruptcy of a person entitled to any such allowance or gratuity, the allowance or gratuity shall not pass to any trustee, or other person acting on behalf of the creditors, but this provision shall be without prejudice to any order of the Court made under s. 51 of the Bankruptcy Act, 1914, or under any corresponding enactment in Scotland or Ireland."

Sect. 8: "Where any sum not exceeding one hundred pounds is payable under this Act in respect of a superannuation allowance or gratuity granted to a deceased teacher, or of a gratuity granted to the legal personal representatives of a deceased teacher, probate or other proof of title of the legal personal representatives may be dispensed with, and the sum may be paid or distributed to or among the persons appearing to the Board to be beneficially entitled to the personal estate of the deceased teacher, or to or among any one or more of those persons, or in the case of the illegitimacy of the teacher or of his children, to or among such persons as the Board may think fit."

Sect. 18: "In this Act, unless the context otherwise requires: 'The expression "gratuity" means any gratuity, or any death gratuity payable under this Act."

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and there appears to be no reported decision upon the Act. Under s. 3 of the Act the Board of Education may grant a death gratuity to the legal personal representatives of a deceased teacher who has been employed as a teacher for five years subsequent to the passing of the Act. There is nothing in the Rules made under the Act which is of any assistance in this case. The grant is entirely a matter of bounty, the teacher has no claim or right to it. The provision in s. 7, sub-s. 2, rendering void every assignment or charge on such a gratuity points to the death gratuity as not available for the creditors of the deceased. There is here a separate and paramount trust in favour of those beneficially interested in the estate of the intestate, that is the next of kin. *Lord Advocate* v. *Bogie* (1) shows the principle upon which the Court may proceed. This provision for a death gratuity is an entirely new one made by this Act of 1918, and by the definition section (s. 18) "gratuity" means any gratuity, or "death gratuity," payable under the Act. It comes, therefore, within the terms of s. 7, sub-s. 2. Sect. 8 only applies in terms to gratuities under 100*l.*, but it contemplates in such cases that the grant might go direct to relatives, as it gives the Board power to distribute the gratuity among persons beneficially entitled to the personal property "or among any one or more of them." There is therefore a power to differentiate between the persons interested. I submit that the plaintiff should hold this grant in trust for herself and her child.

B. A. Hall for the defendant. As to s. 7 of the Act, "gratuity" there can only refer to a gratuity granted during the lifetime of a teacher. Sect. 8 does not apply at all to this case. There is no one who can be entitled to the personal estate of this intestate until all the debts are paid. This death gratuity therefore forms part of the estate of the intestate, and is primarily available for the payment of all debts. The burden of proof to show otherwise is on the plaintiff.

(1) [1894] A. C. 83, 90, 95.

R. M. Pattisson in reply. The words in s. 7 are "any gratuity," and s. 8 gives a discretion to the Board in the distribution.

EVE J. stated the facts and the question raised, and continued: By s. 3 of the Act of 1918 it is provided that, subject to the provisions of the Act, the Board may grant to the legal personal representatives of any teacher qualified as therein mentioned a death gratuity of the amount therein specified, and it is under that section that the death gratuity of 330*l.* was granted in this case. Prima facie, payments to a legal personal representative constitute assets of his testator or intestate to be administered in accordance with the administration bond, applicable for the payment of the administration expenses and debts, and only when these have been discharged for the benefit of those entitled to any surplus that may remain. It is argued, however, on behalf of the intestate's next of kin that a gratuity of this description is not intended for the creditors of the deceased teacher, but ought to be held upon trust for the beneficiaries under his will if he dies testate, or for his next of kin in cases of intestacy. In support of this argument, sub-s. 2 of s. 7 of the Act has been relied on. It is in these terms. [His Lordship read the sub-section.] According to the interpretation section, unless the context otherwise requires the expression "gratuity" means any gratuity or any death gratuity payable under the Act, and there counsel for the plaintiff contends that this sub-section indicates a clear intention on the part of the Legislature to exclude the creditors from any share therein. For the creditors, on the other hand, it is pointed out that the sub-section is in terms quite inapplicable to a death gratuity, and there is in fact a context in which it is impossible to read the word "gratuity" as meaning anything but a gratuity payable to a teacher during his lifetime. I think this is the true construction of the sub-section. Every line of it negatives the idea of a post mortem grant. That disposes of the argument based upon s. 7. Sect. 8, although it does not in terms apply to the present case, was also pressed upon me,

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but the main object of that is to authorize the Board to distribute a grant not exceeding 100*l.* without requiring a legal personal representative of the teacher to be constituted. It is true that the Board may pay or distribute the sum to or among the persons appearing to be beneficially entitled to the personal estate of the deceased, or to or among any one or more of those persons, and it is possible that this might be construed as entitling the Board to disregard the paramount claims of the creditors to the personal estate; on the other hand it cannot be denied that no person can be beneficially entitled to the personal estate if there are creditors still to be paid, and in a case of insolvency the Board might take the view that the creditors were entitled in the first instance. But whatever be the true construction to be imposed on s. 8 it affords me no assistance in this case, where I hold that the gratuity must be primarily applied in payment of the intestate's debts.

Solicitors: *Sharpe, Pritchard & Co., for A. H. Franklin & Son, Oxford; Julius, Edwards & Julius, for Ballard & Co., Woodstock.*

G. M.

BRITISH BROADCASTING COMPANY *v.* WIRELESS LEAGUE GAZETTE PUBLISHING COMPANY.

ASTBURY J.

1926 March 2, 3, 4.

[1925. B. 3663.]

Copyright—Programmes—Compilation of several in advance—Broadcasting Company—Crown Licence—Whether Copyright in Crown—Copyright Act, 1911 (1 & 2 *Geo.* 5, *c.* 46), *ss.* 1, 2, 18, 35.

The plaintiffs were a limited company formed to acquire the Postmaster-General's licence for the establishment and working of broadcasting stations, and to carry on any other business ancillary, incidental, or conducive thereto.

Under the terms of their licence and a supplementary agreement the plaintiffs were required to transmit efficiently every day a programme of broadcast matter to the reasonable satisfaction of the Postmaster-General. They were not allowed to alter their memorandum as to objects without his written consent. He might revoke their licence if they failed to transmit satisfactory programmes, and within one month from their ceasing to hold the licence they were bound to pass a special resolution for voluntary winding up. Their profits from all sources beyond a 7½ per cent. cumulative dividend on their paid up capital belonged to the Postmaster-General.

Nine months after the licence, with the approval of the Postmaster-General, the plaintiffs began publishing the Radio Times every Friday, including therein the advance daily programmes for the ensuing week Sunday to Saturday. These programmes gave the day and hour of each performance, the artist's name, appropriate headings for items or groups of items, and translations of unfamiliar foreign titles of songs or music. The preparation, arrangement, and editing of the actual programmes involved considerable time, skill, labour and expense, although the preliminary work of fixing the days and hours, engaging the artists, and choosing the items had all been done some time beforehand.

The defendants having selected and copied numerous items from a set of advance programmes so published, the plaintiffs sued for infringement of copyright:—

Held, that whether there was or was not copyright in an individual programme, and (semble) in this case there was, there was undoubtedly copyright in the compilation of the seven advance programmes.

University of London Press v. *University Tutorial Press* [1916] 2 Ch. 601, 608 (Examination Papers); *Walter* v. *Lane* [1900] A. C. 539, 552 (Report of Public Speech); *Collis* v. *Cater* (1898) 78 L. T. 613 (Chemist's Catalogue of Drugs); *Blacklock* v. *Pearson* [1915] 2 Ch. 376 (Bradshaw's Station Index); and *Weatherby* v. *International Horse Agency* [1910] 2 Ch. 297, 303, 304 (Stud Book list of mares and stallions) applied.

Held, also, that although the programmes were subject to the approval or veto of the Postmaster-General, who had power to revoke the licence if they included improper matter, they were not a work "prepared or

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published by or under " his " direction or control " within the meaning of s. 18 of the Copyright Act, 1911, and consequently, so long as the plaintiffs were allowed to trade and publish them, the copyright belonged to the plaintiffs and not to the Crown.

WITNESS ACTION.

The plaintiffs were a limited company incorporated on December 15, 1922, with a capital of 100,000*l.* divided into 100,000 cumulative ordinary shares of 1*l.* each, carrying a fixed cumulative 7½ per cent. annual dividend on the paid-up capital, but no further or other participation in profits.

The objects stated in the memorandum were (inter alia) to acquire from the Postmaster-General a licence for the erection, establishment, and operation in the United Kingdom and Ireland of stations as a public utility service for the " broadcasting " supply to the public by wireless telephony or telegraphy of (inter alia) news, concerts, lectures, entertainments and other matter within the licence; to equip and instal the stations with the requisite plant, machinery, and other effects; to carry on any other business necessary, convenient, or expedient for facilitating, developing, or giving effect to the extension, improvement, efficiency and utility of the said " broadcasting " service or giving better and more efficient effect to the provisions of the licence; to carry on so far only as necessary for these objects all kinds of financial, commercial, trading and other operations and any other business capable of being conveniently carried on in connection with these objects or calculated directly or indirectly to enhance the value of, or facilitate the realization of, or render profitable any of the plaintiffs' property or rights; and to do all such other things as they should think incidental or conducive to the attainment of the above objects.

The licence was acquired on January 18, 1923, and originally lasted until January 1, 1925, subsequently extended to December 31, 1926.

Clause 2 authorized the plaintiffs: (*a*) to establish eight wireless stations and therein to instal and work wireless telegraphy apparatus, of which the transmitting and receiving

instruments should be telephones; (*b*) to transmit spoken messages or music constituting broadcast matter; (*c*) to receive messages. Provided that the plaintiffs should not broadcast any news except news obtained on payment from four named news agencies or any other news agency approved by the Postmaster-General.

Clause 5 provided that the plaintiffs should during the continuance of the licence "transmit efficiently" on every day (including Sundays) "a programme of broadcast matter to the reasonable satisfaction of the Postmaster-General."

Clause 21 provided that the plaintiffs should not take any steps to alter their memorandum as to objects without the Postmaster-General's written consent.

Clause 23 provided that the plaintiffs should pay the Postmaster-General a royalty of 50*l.* for each station.

Clauses 25 and 26 provided that the Postmaster-General should charge an annual fee of ten shillings for every broadcast receiving licence and should pay half the fees so received to the plaintiffs.

Clause 27 provided that the Postmaster-General might revoke the licence (inter alia) if in his opinion the plaintiffs failed to transmit efficiently a satisfactory programme of broadcast matter from the said stations or any of them.

Clause 29 provided that the plaintiffs should within one calendar month from ceasing to hold the licence pass a special resolution for voluntary winding up.

On October 1, 1923, a supplementary agreement was made between the Postmaster-General and the plaintiffs extending the term of the licence to December 31, 1926, and providing (cl. 7, sub-cl. 2) that if the plaintiffs' income from all sources during the extended period should be more than sufficient: (1.) to pay such of the plaintiffs' expenditure as the Postmaster-General in consultation with the plaintiffs considered reasonably adequate to provide a broadcasting service to his reasonable satisfaction; (2.) to provide such a reserve fund as the Postmaster-General considered reasonable to meet depreciation and obsolescence of plant and machinery; and (3.) to pay $7\frac{1}{2}$ per cent. per annum on the plaintiffs' subscribed capital,

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any surplus income should be surrendered to the Postmaster-General. The proportion of licence fees payable to the plaintiffs by the Postmaster-General in such a case was also to be reduced according to a scale based on the number of licences on the one hand and the plaintiffs' expenditure on the other hand.

In September, 1923, i.e., nine months after the licence, with the approval of the Postmaster-General and in order to facilitate and develop the efficiency and utility of their broadcasting, and so enhance the value of their property and rights, the plaintiffs, who had been in the habit of supplying their programmes day by day to the press, began publishing the Radio Times every Friday, including therein all the daily programmes for the ensuing week, Sunday to Saturday. These programmes gave the day and hour of each performance, the name of the artist, appropriate headings for items or groups of items, such as "Old Memories," "Children's Corner," "Humour and Request," "Scottish Hour," and translations of unfamiliar foreign titles of songs or music, with occasional misprints such as "Schetterling" (1), "The Butterfly," "Voglein" (1), "The Little Bird," and "Lungi dal cero hena" (1), "When two that love are parted." The preparation, arrangement, and editing of the actual programmes involved considerable time, skill, labour and expense, although of course the preliminary work of fixing the days and hours, engaging the artists and choosing the items had all been done some time beforehand.

On Saturday, August 15, 1925, the defendants published the first (and only) number of the Wireless League Gazette. In this they selected and copied those items from the plaintiffs' advance programmes published on Friday, August 14, which they thought would be most popular (i.e., about half the items), giving the days, artists, titles, translations and headings of those selected items, including "Voglein" and "Lungi dal cero hena," but not "Schetterling," and referring their readers to the Radio Times for the full programmes and actual clock times of transmission.

(1) Sic.

On August 18, 1925, the plaintiffs commenced this action for infringement of copyright. On August 26 Finlay J. as Vacation judge refused to grant an interlocutory injunction on the ground that serious and difficult questions of law were involved, but no further number of the Wireless League Gazette was in fact issued.

The defendants denied that there was any copyright in the programmes or the compilation, or that the defendants' selection therefrom amounted to infringement, and alleged that if any copyright existed it was in the Crown under s. 18 of the Copyright Act, 1911. In their original defence they also said that their selection was a " fair dealing . . . . for the purposes of . . . . newspaper summary " within s. 2, sub-s. 1 (i.), but this was abandoned at the trial.

Jenkins K.C. and *Moritz K.C.* for the plaintiffs. The Copyright Act, 1911, provides (s. 1, sub-s. 1) that copyright shall subsist in every " original literary " work and (s. 1, sub-s. 2) means " the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever, to perform . . . . the work or any substantial part thereof in public." By s. 35, sub-s. 1, " literary work " includes " compilations." By s. 2, sub-s. 1, copyright is infringed by doing anything " the sole right to do which " is conferred on the copyright owner, except (inter alia) " any fair dealing with any work for the purposes of . . . . newspaper summary."

Now here there is quite enough literary work in each programme to support copyright, a fortiori in the compilation. The quality or style of the work is immaterial: *University of London Press* v. *University Tutorial Press* (1); *Walter* v. *Lane*. (2) There can obviously be copyright in bare lists if they are useful: *Collis* v. *Cater* (3) (chemist's catalogue of drugs for sale); *Blacklock* v. *Pearson* (4) (Bradshaw's Station Index); *Weatherby* v. *International Horse Agency* (5) (Stud

(1) [1916] 2 Ch. 601, 608.
(2) [1900] A. C. 539, 552.
(3) 78 L. T. 613.
(4) [1915] 2 Ch. 376, 381.
(5) [1910] 2 Ch. 297, 303, 304.

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Book list of mares and stallions). This copying goes far beyond fair dealing for a newspaper summary. As to the suggestion of Crown copyright, the defendants might just as well say that the copyright in railway time tables is in the Board of Trade.

Macgillivray for the defendants. First: There can be no copyright in a single programme containing a bare list of items. If any such copyright existed the author could stop the performance of the items under s. 1, sub-s. 2, which is absurd.

[ASTBURY J. How can you perform a programme?]

By a performance of the items therein.

[ASTBURY J. Are we performing the Daily Cause List?]

Yes, and if there were any conceivable copyright in it the Crown or the actual author could stop the hearing. The very idea of copyright in such a bare list leads to an absurdity. If there were copyright in railway notices of the running of trains, even if made some time in advance, Bradshaw would be an infringement. Surely there can be no copyright in the list of a Cabinet, cricket team, boat, or the cast of a play, however great the labour of selection. In the same way there can be no copyright in a mere item programme.

[ASTBURY J. Is there not an enormous difference between an individual programme for a single day and a compilation of a week's programmes in advance? *Parry* v. *Moring*. (1)]

Not unless the compilation involves independent work or labour: *Leslie* v. *Young* (2); *Macmillan* v. *Cooper*. (3) In the present case the work is little more than piecing seven non-copyright programmes together, and printing the so-called compilation.

In each of the cases relied on by the plaintiffs there was some original literary work, however humble. But here, after the days and hours were fixed, the artists and items chosen, and so on, the only work left was merely editing and preparing the lists for the press. That is not original literary

(1) (1903) Copyright Cases (1901-4), p. 49.

(2) [1894] A. C. 335, 340, 341.

(3) (1923) L. R. 51 Ind. App. 109, 116, 119, 125.

work. As to the choice of headings or titles, there cannot in general be copyright in such things: *Dicks* v. *Yates* (1); *Broemel* v. *Meyer*. (2)

Secondly: Even if there is copyright, the defendants' acts do not amount to infringement. On the evidence I cannot now say that their publication was a "fair dealing . . . . for the purposes of . . . . newspaper summary" within s. 2, sub-s. 1 (i.). But where there is only a scintilla of copyright, if any, there is no infringement unless the whole is copied. The defendants have only selected and copied a part in order to point out the best items, and there can be no competition with the Radio Times, which is the decisive test: *Weatherby* v. *International Horse Agency*. (3)

Thirdly: The copyright, if any, belongs to the Crown under s. 18. Under the joint operation of the Telegraph Acts, 1863 and 1869 (26 & 27 Vict. c. 112, s. 3; 33 & 34 Vict. c. 73, ss. 3, 4), the Postmaster-General had the exclusive privilege of transmitting and receiving telegrams transmitted by wire or electric signals. Telephones were not then invented. But in *Attorney-General* v. *Edison Telephone Co.* (4) it was held that they were within the monopoly, and indeed that the monopoly would include "electric signals made, if such a thing were possible, ... through . . . . the air." The Wireless Telegraphy Act, 1904 (4 Edw. 7, c. 24), s. 1, now provides that "A person shall not establish any wireless telegraph station or instal or work any apparatus for wireless telegraphy . . . . except under and in accordance with a licence granted in that behalf by the Postmaster-General": see also Wireless Telegraphy (Explanation) Act, 1925 (15 & 16 Geo. 5, c. 67), s. 1.

Now having regard to the terms of the memorandum, licence and supplementary agreement it is tolerably clear that the plaintiffs, unlike the National Telephone Co. or the Exchange Telegraph Co., who were entirely independent bodies working for their own profit under licence, are under the

(1) (1881) 18 Ch. D. 76, 88, 92, 93. p. 336; 29 Times L. R. 148.
(2) (1912) L. R. Dig. (1911–1920), (3) [1910] 2 Ch. 297, 304.
(4) (1880) 6 Q. B. D. 244, 249.

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complete control of the Postmaster-General, on whom their very existence depends and who is entitled to all profits beyond 7½ per cent. They are virtually a sub-department acting under him in every respect, for that maximum remuneration. In these circumstances the copyright, if any, in the programmes surely belongs to the Crown under s. 18, which provides that "where any work has . . . . been prepared or published by or under the direction or control of His Majesty or any Government department, the copyright . . . . shall . . . . belong to His Majesty."

Apart from the programmes the Radio Times is not under the Postmaster-General's control, though its income would have to be brought into account under cl. 7, sub-cl. 2, of the supplementary agreement. But the programmes are absolutely under his control, and the copyright, if any, is therefore in the Crown. The copyright in the rest of the paper no doubt belongs to the plaintiffs.

Jenkins K.C. in reply.

ASTBURY J. [after stating the facts:] Deliberate copying being established, the only question is one of law. The first question is whether the plaintiffs can have any copyright in their compilation of advance programmes.

In *University of London Press* v. *University Tutorial Press* (1), relied on by the plaintiffs, it was held that copyright subsisted in examination papers as "original literary work." Peterson J. said: "In my view the words 'literary work' cover work which is expressed in print or writing, irrespective of the question whether the quality or style is high. The word 'literary' seems to be used in a sense somewhat similar to the use of the word 'literature' in political or electioneering literature and refers to written or printed matter. Papers set by examiners are, in my opinion, 'literary work' within the meaning of the present Act. Assuming that they are 'literary work,' the question then is whether they are original. The word 'original' does not in this connection mean that the work must be the expression

(1) [1916] 2 Ch. 601, 608.

of original or inventive thought. Copyright Acts are not concerned with the originality of ideas, but with the expression of thought, and, in the case of 'literary work,' with the expression of thought in print or writing. The originality which is required relates to the expression of the thought. But the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work—that it should originate from the author."

The plaintiffs also rely on *Walter* v. *Lane* (1) (Copyright in report of a public speech); *Collis* v. *Cater* (2) (Copyright in chemist's catalogue of drugs for sale); *Blacklock* v. *Pearson* (3) (Copyright in Bradshaw's Station Index) and *Weatherby* v. *International Horse Agency* (4) (Copyright in Stud Book list of thoroughbred mares and stallions). In the last case Parker J. said (5): "By utilising the Stud Book lists the defendants have, in fact, saved themselves the labour and expense which would have been involved in preparing such lists by means of researches of their own, and, if they were entitled to do this, it follows that the editors of the Stud Book, had they desired to publish the Bruce-Lowe numbers of the mares and stallions appearing in vol. 21, would, in spite of the labour and cost of preparing up-to-date lists of such mares and stallions, be in no better position to do so than any other of His Majesty's subjects. It is said that there can be no copyright in a mere list of names, and this may be true where the list of names conveys no useful information whatever, because to support every copyright there must be an element of literary value. It may also be true in the sense that every one who by original work compiles some list may publish it as an original list of his own, but it is equally certain that, if the list be the subject of copyright at all, no one is entitled in compiling a like list to save himself the trouble of original work by copying an already existing list, the copyright of which belongs to another."

(1) [1900] A. C. 539, 552.
(2) 78 L. T. 613.
(3) [1915] 2 Ch. 376, 381.
(4) [1910] 2 Ch. 297.
(5) [1910] 2 Ch. 303.

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The defendants rely on a later passage, where Parker J. said (1): "Then it is said that the real and only test as to whether or not the defendants have made an unfair use of vol. 21 of the Stud Book lies in the answer to the question whether there will be any competition between such volume and the defendants' book. It is no doubt true that where, as is often the case, it is a difficult matter to determine whether in preparing one publication an unfair use has been made of another, the nature of the two publications and the likelihood or unlikelihood of their entering into competition with each other is not only a relevant but may be even the determining factor of the case. But, in my opinion, an unfair use may be made of one book in the preparation of another, even if there is no likelihood of competition between the former and the latter. After all copyright is property, and an action to restrain the infringement of a right of property will lie even if no damage be shewn."

In the present case the plaintiffs' compilation was a publication involving considerable time, skill, labour and expense, and a publication of matter solely within their knowledge. The defendants say that their publication will not compete with the plaintiffs' Radio Times. I dare say it will not compete seriously. But that is no reason why the defendants should appropriate any part of the plaintiffs' work by copying it.

The defendants rely on three points. In the first place they contend that there can be no copyright in the plaintiffs' compilation. They say that there can be no copyright in an individual concert programme. I do not see why not, if that programme involves literary authorship. The defendants contend that if there were any such copyright, the author could prevent the performance of the items in the programme. I cannot myself understand how any one can perform a directory or a programme. But even assuming that there is no copyright in an individual item programme, that would not prevent the plaintiffs being entitled to copyright in a compilation of several advance programmes. The

(1) [1910] 2 Ch. 304.

defendants contend that a mere compilation of non-copyright programmes, involving no further work than putting them together, cannot give copyright. The answer is that the compilation required very considerable work, and was not a mere collection of what had already been prepared.

Secondly, the defendants say that there is no infringement. After hearing the evidence they have withdrawn their defence that their publication was a " fair dealing . . . . for the purposes of . . . . newspaper summary " within s. 2, sub-s. 1 (i.), but they still say that the plaintiffs' copyright, if any, was so meagre that it could only be infringed by taking the whole. I do not think this is made out, and in any case there was wholesale copying.

The defendants' third point—namely, that the copyright, if any, is in the Crown—is one of very great interest. Sect. 18 provides that where any work has been " prepared or published by or under the direction or control of His Majesty or any Government department " the copyright shall belong to His Majesty.

In the present case I am of opinion that the Radio Times programmes were not a work prepared or published by or under the direction or control of His Majesty or the Postmaster-General within the meaning of this section.

The true effect of the memorandum, licence and supplementary agreement is that the plaintiffs are a licensed corporation entitled so long as they comply with the requirements of the licence to carry on their broadcasting service for profit and to acquire and hold assets to effect that service. They are in a somewhat analogous position to the National Telephone Co. and the Exchange Telegraph Co., which worked for profit under a licence. It is true that if the plaintiffs publish improper matter in their programmes the licence can be revoked, but so long as they are allowed to trade and publish the programmes under their licence, the property therein is their own asset.

The defendants contend that all the plaintiffs' acts were done in pursuance of their licence. This in a sense is true. They could only give broadcasting performances under their

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licence, and it would have been futile to publish a list of items that they would not have been allowed to broadcast. But so long as they are allowed to carry on their broadcasting business for their own profit up to the 7½ per cent. maximum, the property in the Radio Times, including the programmes, brought into existence for the purposes of that business, is their own.

The defendants do not in fact suggest that the Radio Times itself is a Government publication. They merely contend that the copyright, if any, in the programmes is Government property. This point they have not established, nor is it sound.

The plaintiffs therefore succeed, and are entitled to an injunction, damages, delivery up and costs.

Solicitors: *Steadman, Van Praagh & Gaylor; Firth & Co.*

G. R. A.

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ATTWOOD *v.* LLAY MAIN COLLIERIES, LIMITED.

[1924. A. 2667.]

Mineral Lease—Boundaries—Assumed Position of Fault—Riparian Tenement—Diversion and Confiscation of Part of River for extraordinary Purposes—Proof of Damage—Demise of Surface with Liberty to construct thereon a Mineral Railway—Power to lay Water Pipe under Surface—Mineral Railway for Purposes of Colliery—Carriage over Mineral Railway of Materials of Strangers for building Miners' Houses.

By lease, in 1924, the plaintiff demised to the defendants for ninety-nine years, first, the minerals in and under so much of the land coloured red on plan A as lay to the east side (wherever actually met with) of the W. fault, the assumed position of which was shown on the said plan, and on the south side (wherever actually met with) of the B. fault, the assumed position of which was also shown on the plan, and also under all highways, sewers, etc., such minerals containing 357 superficial acres, more or less, as investigation might prove, though that estimate was not to bind the lessor or lessees as regards the quantity, unless it was correct, which lands were referred to as "the described lands"; secondly, the surface of the lands coloured blue on plan B containing 5 acres, 2 roods, 12 poles up to the middle of the river Alyn. The demise included the following liberties: (Cl. 8.) To construct

maintain and use a mineral railway upon the surface of the blue land, to be used solely for the purposes of the colliery working the demised minerals and of the lessees. (Cl. 9.) To take and use water from any stream or watercourse flowing through or alongside the described lands, and to pump and store the same for the purposes of the colliery. The blue land upon which the mineral railway was constructed, connecting the colliery with the Great Western Railway on the opposite or west side of the river, was a narrow strip with an average width of twenty-two yards, abutting west on the river and extending eastward about half-a-mile, from which point the line was continued eastward for a further half mile along another site acquired by the defendants up to the colliery workings. The defendants had placed a pipe in the river and erected pumping plant on the blue land at a spot where the mineral railway crossed the river, and by these means took water from the river and conducted it in a seven-inch main laid 18 inches below the surface of the blue strip to the colliery workings, where the water was converted into steam for working the colliery machinery, in which process about 600,000 gallons a week were taken from the river, while the plant working at its full capacity was capable of abstracting more than three times that quantity. Further, the defendants, who, owing to lack of housing accommodation for their miners, were interested in the building of houses by certain Housing Associations on land acquired for that purpose by those bodies adjoining the colliery, used their railway for the carriage of building materials belonging to builders with whom those bodies had contracted.

In an action in which the plaintiff sought declarations that the defendants were not entitled to do any of the acts aforesaid, and an injunction :—

Held, first: (*a*) that the defendants having failed to prove that the assumed position of the W. fault was erroneous and that "the described lands" extended up to the bank of the river Alyn, the rights of the parties under the lease must be governed by the assumed position of the W. fault; and, therefore, the defendants were not entitled to abstract water therefrom under any liberty contained in cl. 9 of the lease; (*b*) that the site of the defendants' colliery works, where the water abstracted from the river was converted into steam, was too far from the bank of the river to sustain the character of a riparian tenement; and (*c*) that, even assuming the site of the defendants' colliery works to be a riparian tenement, the diversion and confiscation of part of the water of the river by them was in excess of their right as riparian owners to the use of the water for extraordinary purposes; and, without proof of damage and apart from the consideration of the possible acquisition of right by prescription, was an infringement of the rights of the plaintiff, entitling him to an injunction.

Held, secondly: (*a*) that, in the absence of any express or implied prohibition against using the "surface" of the blue land for any other purpose than that of a mineral railway, the demise thereof carried with it the right to use it for any purpose not inconsistent with its use for a mineral railway; and (*b*) that as the lease indicated the purpose for which that surface was demised, the demise thereof included so much of the subsoil as was required for the construction and convenient

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working of a mineral railway, and carried with it the right to lay and maintain the water pipe in such subsoil.

Held, lastly, that in carrying materials belonging to the builders employed by the Housing Associations, the defendants were not using the railway for the purposes of their colliery or for their own purposes.

Accordingly it was declared that the defendants were not entitled to take and use water from the river Alyn for the purposes of their colliery or to carry on the mineral railway the building materials aforesaid.

The principle of *Swindon Waterworks Co.* v. *Wilts and Berks Canal Navigation Co.* (1875) L. R. 7 H. L. 697 and *McCartney* v. *Londonderry and Lough Swilly Ry. Co.* [1904] A. C. 301 applied.

ACTION WITH WITNESSES.

The following facts are taken from the judgment of the Court:—

The plaintiff, who was the owner in fee of certain lands at Llay and Burton in the county of Denbigh lying to the east of the river Alyn, by a lease dated November 11, 1924, demised to the defendant company (hereafter called "the defendants") for a term of ninety-nine years, first, the mines, veins, seams of coal, cannel, ironstone and fireclay (thereinafter referred to as the "demised minerals"), in and under so much of the land coloured red on plan A annexed to the lease as lay on the east side (wherever actually met with) of a fault known as the 230 yards or Wrexham fault, the assumed position of which was shown on such plan and on the south side (wherever actually met with) of a fault known as the Bala fault, the assumed position of which was also shown on such plan and also (so far as the lessor could lawfully grant) under all highways sewers drains and watercourses constructed upon, running through or adjoining the land limited by such faults, such demised minerals containing by estimation 357 superficial acres or thereabouts were the same more or less as investigation might prove, though that estimate should not be deemed to bind either the lessor or the lessees as regards the quantity, unless it were correct, which lands highways sewers drains and watercourses were thereinafter referred to as "the described lands"; secondly, the surface of the land coloured blue on plan B annexed to the lease containing by admeasurement 5 acres, 2 roods, 12 perches or thereabouts up to the middle of the river Alyn.

There were included in the demise and for the purposes thereof and for all other purposes connected with the due and proper working of the demised minerals and of similar minerals under other lands belonging or in lease to or worked or gotten by the lessees and disposing of the produce thereof (amongst others) the following liberties: (Clause 8.) To construct, maintain and use a single line mineral railway upon the surface of the lands coloured blue on the plan thereto annexed and marked B, such railway to be used by the lessees solely for the purposes of the colliery working the demised minerals and of the lessees and for such other purposes as were therein specifically authorized and the lessees might utilize for the purposes of the said line any substances which they might excavate from any cuttings which they might make in the said lands coloured blue. (Clause 9.) Liberty and power (so far as the lessor could grant the same) to take and use water from any streams or watercourses flowing through or alongside the described lands and to pump, raise and store the same for the purposes and for the use of the colliery, but not so as to foul or pollute the water. By cl. 15, it was provided that the lessees should also pay for or in respect of the land whereof the surface was thereby demised for the purpose of the said railway as the same was delineated and coloured blue on the plan marked B hereto annexed a yearly rent of 335*l.*

The land coloured blue was acquired by the defendants for the primary purpose of constructing and working thereon a mineral railway to connect the Llay Main Colliery with the Great Western Railway at a point on the opposite or west side of the river Alyn. It consisted of a narrow strip with an average width of 22 yards, abutting west on the river, and extending eastward about half a mile, from which point the line was continued eastward for a further half mile along a site acquired by the defendants partly from the plaintiff and partly from other persons. The defendants had placed a pipe in the river and erected some pumping plant on the blue land at the spot where the mineral railway crossed the river. By these means, the defendants took water out of

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the river and conducted it in a seven-inch water main to a storage reservoir situate about a mile to the east of the river near the pits of the defendant colliery company. The water thus taken and stored was used by the defendants for the purpose of generating steam necessary for working the defendants' machinery at the colliery, in which process the water was consumed. The pumping plant and main, if used to their full capacity, could take out of the river 333 gallons of water a minute, equal to about 480,000 gallons per diem. The defendants had not worked their pumping plant and main to the full capacity; their practice had been to work the pumps for only six hours a day during the six working days of the week, and the total quantity of water taken in the past amounted approximately to 100,000 gallons a day.

The defendants employed a large number of miners and other workmen at their colliery. The housing accommodation in proximity to the colliery was wholly insufficient, and many of the employees had to come a long distance to their work. In those circumstances, some of the directors and officers of the defendant company on January 15, 1920, registered a society called the Llay Housing Association, Ld., under the Industrial and Provident Societies Act, 1893, for the purpose of acquiring land in the neighbourhood of the colliery and of erecting thereon dwelling-houses and other buildings for the use of the employees at the colliery. The Association, accordingly, purchased about 120 acres of land close to the colliery and commenced the erection of such dwelling-houses and other buildings, obtaining financial assistance for that purpose by way of loan from the defendants and from the Government under the Housing, Town Planning Act, 1919. After the Association had erected 200 houses, covering an area of about 21 acres, it sold off a part of the remainder of the 120 acres to a company registered under the Companies Acts, called the Industrial Housing Association, Ld. (hereinafter called the "Industrial company"). The Industrial company later on purchased a further two and a half acres of land from another owner. On the land so acquired the Industrial company caused 200 houses

to be built. Those houses were built at the request of the defendants, who undertook to accept a lease from the company when completed. Those 200 houses were completed and leased to the defendants for thirty years at yearly rents amounting in the aggregate to 5950*l*. The Industrial company had recently purchased a further piece of land from the Association upon which the company was causing sixty-four houses more to be erected. Those houses were also being built at the request of the defendants and on a similar undertaking to accept a lease. The Association had from time to time sold further parts of the 120 acres to various religious and public bodies for the erection of churches and schools. The 200 houses which the Association caused to be built in the first instance were let to miners and other persons connected with the defendants' colliery, and the Association received the rents of those houses. All the buildings caused to be erected by the Association, the Industrial company and the other bodies were erected under contracts entered into with builders, who in turn contracted with the defendants for the carriage by their mineral railway at agreed rates of the necessary building materials, plant, etc., from a siding on the Great Western Railway to the defendants' colliery.

The plaintiff pleaded that whatever might be proved to be the actual position of the 230 yards fault in contradistinction from the assumed position agreed on by the parties, it at all events lay at a considerable distance on or towards the east from the bed of the river; he alleged that he had suffered damage by reason of the defendants' wrongful acts, and claimed to have it declared: (1.) that the defendants were not entitled for the purpose of supplying their colliery with water or for any other purpose to pump water from the lands lying on the west side of the 230 yards fault, the assumed position of which was shown on the plan A annexed to the lease of November 11, 1924; (2.) that the defendants were not entitled by means of pumps and pipes laid by them in lands lying between the river Alyn and the said fault to pump water for those purposes; and (3.) that the defendants were not entitled to use the mineral railway for the purpose of

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carrying over the same materials for building a town or village then in course of erection by the defendants or by the Housing Associations or for purposes of general goods or passenger traffic, and for an injunction to restrain the acts complained of.

The defendants admitted the laying of the water main in the blue land and pumping water from the river Alyn, but denied that either of those acts were wrongful, and sought to justify them by virtue of express or implied powers contained in the lease, or (in the case of the abstraction of water from the river) in the alternative, by virtue of their rights as upper riparian owners. It was contended by the defendants at the trial that the plaintiff's statement of claim was limited to the question whether or not the lease conferred on the defendants a right to take and use water from the river Alyn and that it was not open to the plaintiff to raise the question of an invasion of his rights as lower riparian owner. The Court, after having offered the plaintiff the opportunity of amending his pleading, which was declined, held that it clearly appeared from the statement of claim and a comparison of the plans A and B of the lease referred to in the statement of claim that the plaintiff was a lower riparian owner, a fact which was not disputed by the defendants; and as, according to the plaintiff's own allegation in his statement of claim, the defendants claimed a right to take and use water from the river Alyn under the terms of the lease or "irrespective of such terms," the trial was allowed to proceed on the same footing as if the plaintiff had pleaded his rights as riparian owner. With the view of proving that the assumed position on the plan to the lease of the Wrexham fault was not the true one, evidence was given at the trial by expert witnesses called on behalf of the defendants that the Wrexham fault did not extend as far northward as the Paper Mill fault, but stopped short of it and, therefore, did not cross that fault.

The defendants admitted that they had used the railway for the carriage of goods on behalf of various persons in the neighbourhood or for purposes other than those of the defendants

or their colliery, in respect of which they paid into Court the sum of 34*l.*, being the amount which they admitted to have received for the carriage of such goods, but contended that they were authorized by the lease to carry materials over the railway for the purposes of the mining village.

Grant K.C. and *MacSwinney* for the plaintiff. First, as to the abstraction of water from the river: the defendants had no power, under cl. 9 of the lease, to take water for their colliery, because the river does not flow through or alongside "the described lands": those lands must be taken to be bounded by the assumed position of the Wrexham fault as shown on the plan to the lease, the assumed position being considerably to the east of the river. In order to show that the river flows alongside "the described lands," it is incumbent on the defendants to satisfy the Court, not only that the assumed position of the fault shown on the plan is not its true position, but that the fault lies under or to the west of the river Alyn. As to the rights of the defendants as riparian owners in respect of that end of the strip of blue land which abuts on the river: the defendants are, we admit, entitled to take water for extraordinary purposes, but their right must be confined to the use of the riparian tenement; here, the riparian tenement cannot extend to the colliery pit head nearly a mile away from the river, where the water taken is converted into steam. Further, there is a complete diversion of a large volume of water from the river, none of which is returned to the river. It is not incumbent on the plaintiff to prove damage; it is enough to show that his right to the natural flow of the water, subject to the rights of the defendants as upper riparian owners, has been infringed. It is not necessary to prove actual damage; it is enough to show an obstruction of the plaintiff's rights, in which case the law will infer damage; nor does it matter to what extent the plaintiff has used the water in the river or whether he has used it at all. In either case, his right has been equally invaded: *Sampson* v. *Hoddinott.* (1) Here, the defendants have

(1) (1857) 1 C. B. (N. S.) 590.

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exceeded their rights, and in so doing they have infringed the rights of the plaintiff, who is consequently entitled to the declaration asked for and to an injunction. Secondly, the defendants had no right to lay and maintain the water main under the surface of the blue land. Only the "surface" of the blue land was demised to the defendants, and upon the true construction of the lease the use of it is restricted to the construction and maintenance thereon of a mineral railway. There is an implied condition that the blue land is to be used for no other purpose; and this construction is confirmed by cl. 15 of the lease, where the blue land is referred to as "the surface demised for the purposes of the said railway": *Kehoe* v. *Marquess of Lansdowne.* (1) A surface owner has no right to the subsoil, so as to entitle him to lay pipes under it: *Goodson* v. *Richardson* (2); *Tunbridge Wells Corporation* v. *Baird* (3); *Battersea Vestry* v. *County of London and Brush, &c., Co.* (4) "Surface" or superficies, prima facie, means nothing more than the mere "vestimenta terrae"; but the term "surface" may be used in a secondary sense, so as to pass the subsoil excepting the minerals, as, where land is conveyed except the mines and minerals: MacSwinney on Mines, 5th ed., p. 23. But here the demise is of the surface for the purpose of constructing and maintaining a railway upon it; that is sufficient to pass a right to use the subsoil so far as that right is required for that specific purpose. But laying a water pipe even on the surface would constitute a trespass, much more would laying it in the subsoil. It is the liberty which is given to make the railway which by implication gives the right to disturb the subsoil, but only for the purpose of the railway: *Pountney* v. *Clayton.* (5)

Thirdly, by cl. 8 of the lease the railway was to be used solely for the colliery working the demised minerals and of the lessees. Therefore, the defendants are not entitled to use the railway as common carriers of the goods of third parties, such as the Llay Housing Association and the

(1) [1893] A. C. 451.
(2) (1874) L. R. 9 Ch. 221.
(3) [1896] A. C. 434.
(4) [1899] 1 Ch. 474.
(5) (1883) 11 Q. B. D. 820, 834.

Industrial Housing Association. Such a use of the railway is unauthorized.

Maugham K.C. and *David Bowen* for the defendants. As to the abstraction of water: First, the defendants have the right to do what they are doing under an express grant in cl. 9 of the lease to take water from the river Alyn for the purposes of their colliery. The river flows alongside "the described lands." The "described lands" include the whole of the land coloured red on the plan on the lease up to the river: they have an artificial meaning, as is shown by cl. 1 of the lease; they include all the land right up to and including half the bed of the river, unless the position of the Wrexham fault can be shown (as the plaintiff has failed to show) to be east of the river. The plaintiff, having alleged in his statement of claim that the actual position of the Wrexham fault lies considerably to the east of the river, the onus is on him to prove its existence, and he has failed to discharge it. As the land used for the mineral railway abuts on the river Alyn and extends up to the colliery workings, the defendants are riparian owners, and as such owners have the right to take and use water from the river for the purposes of their colliery. The blue land is in contact with the flow of the river, and it is that contact which gives rise to the right; and the whole strip being, throughout its entire length up to the colliery workings, in the possession of the defendants, that riparian contact gives them the right to use the water for the benefit of their colliery at the easternmost end of the strip: Coulson on Water, 4th ed., p. 105; *Crossley & Sons* v. *Lightowler*. (1) The water is used for creating steam to be used for colliery purposes in connection with a riparian tenement. An upper riparian owner is entitled to the water for extraordinary purposes, provided he does not sensibly diminish the flow or change the quality of the water; he may take all the water, provided he returns it to the river substantially undiminished in quantity and unaltered in quality. The water which the defendants are taking is used for the purposes of the riparian tenement. Here the defendants cannot gain a right by

(1) (1867) L. R. 2 Ch. 478.

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prescription against the plaintiff in the absence of evidence that by this abstraction of the water they are sensibly diminishing the flow of water in the river. Whenever one does an act which, if repeated, would operate in derogation of the right of another, he is liable to an action, even though no particular damage be proved, at the suit of the person whose right may be affected: *Harrop* v. *Hirst*. (1) But here no right of the plaintiff has been interfered with by the defendants. It has not been proved that the right of the plaintiff to the undiminished flow of the water has been infringed. In *Swindon Waterworks Co.* v. *Wilts and Berks Canal Navigation Co.* (2) the waterworks company were held not entitled to collect the water in a reservoir and sell it to the inhabitants of the adjacent town, and were restrained by the Court from diverting the stream into the reservoir so as to interfere with the supply of water required for the navigation of the canal: in that case Lord Selborne said that the diversion of the water had (as it necessarily must have had) the effect of sensibly diminishing the supply of water necessary for the navigation at the very time when it was most wanted. And in *McCartney* v. *Londonderry, &c., Ry. Co.* (3) true it is there was no substantial damage; but the question was whether the use which the railway company was making of the water and which they claimed as of right infringed the mill-owners' rights, and it was held that the railway company ought not to be allowed to acquire by prescription the right which they claimed to interfere with the riparian right. But there the water in the stream must have been sensibly diminished. The defendants cannot gain a right by prescription against their own lessor: *Kilgour* v. *Gaddes*. (4)

Secondly, as to the right to place a pipe in the blue land: cl. 8 of the lease granting liberty to construct a railway on the blue land has not the effect of confining the right of the defendants to that specific use of it nor of excluding them from using the land in other usual ways; nor is the reference in cl. 15 to the specific purposes of a railway sufficient to

(1) (1868) L. R. 4 Ex. 43, 46, 47.
(2) L. R. 7 H. L. 697.
(3) [1904] A. C. 301.
(4) [1904] 1 K. B. 457, 462.

so restrict the user. No negative covenant ought to be implied. The decision in *Kehoe* v. *Marquess of Lansdowne* (1) was based upon the construction of a particular agreement inartificially drawn, and there was there a particular recital which showed, in Lord Herschell's judgment, that the agreement there was to grant and let for the specific purpose only, and that the application of the premises for any other purposes would be a breach of the agreement.

Thirdly, the building materials were carried on the railway "for the purposes of the lessees" within the meaning of cl. 8. It has been proved that it was impossible to accommodate the miners without providing the village. It cannot be material that a third party had contracted to build for the defendants. The bulk of the money for building the cottages was provided by the defendants and the Public Works Loan Co. The Housing Association acted as the agents of the defendants. The defendants were entitled to carry the materials for the building contractors, because those materials were, in a broad sense, destined for the purposes of the defendants' colliery.

Grant K.C. in reply. The ground of the decision of the House of Lords in *McCartney* v. *Londonderry, &c., Ry. Co.* (2) was not that the plaintiff had suffered actual damage, but that he had a right or "jus" which the defendants had infringed, which entitled him to come to the Court for relief: see per Lord Macnaghten. (3)

Cur. adv. vult.

Dec. 2. LAWRENCE J. In this action the plaintiff complains of the following acts of the defendant company which he alleges to be wrongful: (*a*) the abstraction of water from the river Alyn; (*b*) the laying of a water main from the river Alyn to the defendant company's colliery, known as the Llay Main Colliery; and (*c*) the carriage of building materials over the mineral railway which connects the Llay Main Colliery with the Great Western Railway. The defendant company asserts that none of these acts are wrongful and claims the right to continue them. [His Lordship then stated the lease and the facts concerning the erection of pumping plant and the

(1) [1893] A. C. 451. (2) [1904] A. C. 301. (3) [1904] A. C. 309.

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placing of the pipe in the river Alyn and the abstraction by those means of water therefrom for the purposes of the defendants' colliery, and then continued:] The defendant company seeks to justify this abstraction of water from the river Alyn under cl. 9 of the lease and alternatively under its riparian rights. No other justification has been suggested.

It is contended that the river Alyn is a stream or water-course flowing alongside the described lands, and consequently that cl. 9 confers upon the defendant company the right to take, store and use the water from that river for the purposes of the Llay Main Colliery. According to plan A the river Alyn does not flow either through or alongside the described lands, as the assumed position of the Wrexham fault shown on that plan lies a considerable distance to the east of the river. But the defendant company alleges that investigation has shown that the Wrexham fault does not cross the Paper Mill fault and that the assumed position of the Wrexham fault is not the actual position of that fault, and contends that, in these circumstances, it follows that the river Alyn does flow through or alongside the described lands. This contention seems to me to be illogical and illfounded. Unless the defendant company establishes not only that the assumed position of the Wrexham fault is erroneous in fact, but also that the true position of such fault is either under or to the west of the river Alyn, it is clear that the defendant company cannot succeed in its contention that this river flows through or alongside the described lands.

The defendant company has not worked any of the demised minerals in the immediate neighbourhood of the assumed position of the Wrexham fault, but has adduced a considerable body of evidence directed to show that the Wrexham fault stops short of and does not cross the Paper Mill fault. [His Lordship then examined the evidence given by the expert witnesses for the purpose of locating the position of the Wrexham fault, and after saying that in the result he had come to the conclusion that the defendant company had failed to prove that the Wrexham fault did not exist to the north of the Paper Mill fault and that the precise position of the

Wrexham fault in that locality was just as much in doubt now as it was when the lease was granted, continued :] In these circumstances, I am of opinion that, until the contrary has been established, the assumed position of the Wrexham fault as shown on plan A must be the one which governs the rights of the parties under the lease and, consequently, that the described lands do not extend up to the river Alyn.

Even if the defendant company had established that the Wrexham fault did not cross the Paper Mill fault, I am at a loss to understand how that fact would have helped the defendant company's case. On that assumption, either the bulk of the minerals purporting to be demised would be excluded altogether from the lease or else, which I think is more probable, the lease would be so construed as to include all the minerals lying to the east of the assumed position of the Wrexham fault. In neither case, however, would the described lands extend up to the river Alyn.

Counsel for the defendant company further contended that the liberty and power to take and use water contained in cl. 9 of the lease must have been intended and ought therefore to be construed so as to authorize the taking and using of the water of the river Alyn, because there was no other stream or watercourse flowing through or alongside the described lands. The conclusive answer to this argument is that no such intention is apparent on the face of the lease, and that there are at least two, if not more, of such streams or watercourses. Even if there had been no such streams or watercourses, the insertion of a common form clause frequently found in mining leases limited to " streams and watercourses flowing through or alongside the described lands " would not justify the Court in holding that it authorized the taking and using of the water from the river Alyn which (even if it be a stream or watercourse within the meaning of that clause) does not flow through or alongside the described lands.

In my judgment therefore the defendant company is not entitled to take and use water from the river Alyn under the liberty contained in cl. 9 of the lease.

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The next question is whether the defendant company can justify the taking and user of the water from the river Alyn by reason of the demise of the surface of the land coloured blue on plan B. This demise, which includes the surface of half of the bed of the river Alyn, in my opinion constitutes the defendant company a riparian proprietor, and, apart from any express or implied reservation in favour of the lessor, entitles the defendant company to exercise the rights incident to its riparian tenement.

The lease contains no express exception or reservation of water rights in favour of the lessor, and on the assumption that the demise is not limited to the sole purpose of a mineral railway (a question dealt with later), I am of opinion that no such exception or reservation ought to be implied.

In these circumstances it becomes necessary to consider whether the taking and user by the defendant company of water from the river Alyn in the manner and to the extent mentioned is in excess of the rights incident to the riparian tenement.

The law on the subject of the right of a riparian owner to take and use the water to which his tenement gives him access is exhaustively dealt with and clearly stated by the House of Lords in *Swindon Waterworks Co.* v. *Wilts and Berks Canal Navigation Co.* (1), and in *McCartney* v. *Londonderry and Lough Swilly Ry. Co.* (2) For the purpose of this judgment, it is sufficient to state that a riparian owner may take and use the water for ordinary purposes connected with the riparian tenement (such as domestic purposes or the wants of his cattle), and that in the exercise of his right, he may exhaust the water altogether; that he may also take and use the water for extraordinary purposes, if such user be reasonable and be connected with the riparian tenement, provided that he restores the water so taken and used substantially undiminished in volume and unaltered in character; and lastly, that he has no right whatever to take the water and use it for purposes unconnected with the riparian tenement.

(1) L. R. 7 H. L. 697. (2) [1904] A. C. 301.

Applying these principles to the facts of this case, I have come to the conclusion that the defendant company is not justified in taking and using the water from the river Alyn in the manner mentioned. In the first place, I am of opinion that the water so taken is not used on or in connection with the riparian tenement. The question whether a particular piece of land sustains the character of a riparian tenement or not, is a question of fact and must be determined according to the special circumstances. In the present case, the defendant company contended that the site of its works had become a riparian tenement, because of the acquisition of the strip of land upon which the main portion of the mineral railway connecting the Llay Main Colliery with the Great Western Railway was constructed. The land coloured blue on plan B formed part of this strip, and so far as it abuts upon the river Alyn consists of a narrow piece of land about half a mile in length having an average width of one chain. The remainder of the site of the railway has been acquired by the defendant company partly from the plaintiff and partly from other persons. In my judgment, the occupation of the strip of land upon which the mineral railway has been constructed does not have the effect of converting the site of the defendant company's works, which is at least a mile away from the river, into a riparian tenement, an expression which in my opinion connotes, in addition to contact with the river, a reasonable proximity to the river bank. The proposition that every piece of land in the same occupation which includes a portion of the river bank and therefore affords access to the river is a riparian tenement is, in my opinion, far too wide. In order to test it, let me take an extreme case: nobody in their senses would seriously suggest that the site of Paddington Station and Hotel is a riparian tenement, although it is connected with the river Thames by a strip of land many miles long, nor could it reasonably be suggested that the whole of a large estate of, say, 2000 acres was a riparian tenement, because a small portion of it was bounded by a stream. Yet, if the argument submitted in the present case on behalf of the defendant company were

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carried to its logical conclusion, both Paddington Station and Hotel and the hypothetical estate would be riparian tenements. In the present case the site of the defendants' works is, in my opinion, too far away from the river bank to sustain the character of a riparian tenement, and I find as a fact that it is not such a tenement.

Assuming, however, that I am wrong and that the site of the defendant company's works is in fact a riparian tenement, I am clearly of opinion that the manner in which the defendant company uses the water there cannot be justified. The defendant company converts the whole of the water which it takes into steam for driving the machinery at its works, and does not return any of the water so taken to the river. Thus the defendant company takes the water for extraordinary purposes without returning it to the river, which is a wholly unauthorized user.

It is contended, however, by the defendant company that, in order to succeed in his claim as lower riparian owner, it is essential that the plaintiff should establish either that he has suffered damage or that he will inevitably suffer damage or, at least, that the defendant company, if not stopped, will acquire a prescriptive right, and that he has not attempted nor would he be able to establish any of these matters. In my opinion, this contention is not well founded. It is true that, in several cases, the reason given for granting relief, where the plaintiff had sustained no damage, was that, unless stopped, the defendant would acquire a prescriptive right; but, in my opinion, this is not the only reason which will induce the Court to interfere. Here what the defendant company is doing amounts to a complete diversion of part of the river Alyn and a confiscation of the rights of the plaintiff as lower riparian owner, and the defendant company claims the right to continue such diversion and confiscation. In such a case, I am of opinion, that questions of damage and of the possible acquisition of prescriptive rights become immaterial, and that the plaintiff is entitled to relief without proof of damage, notwithstanding that the defendant company cannot, as against him, acquire a

prescriptive right: see the speech of Lord Halsbury L.C. in *McCartney's* case. (1)

In the result I hold that the plaintiff is entitled to prevent the defendant company from taking and using the water from the river Alyn for colliery purposes.

The next point for consideration is whether the defendant company has committed a trespass on the plaintiff's land by laying the water main in the land coloured blue on plan B. The solution of this question in my opinion turns entirely upon the construction of the lease. It is contended by the plaintiff, first, that the lease demises the surface of the blue land for the sole purpose of constructing and working the mineral railway, and that there is an implied condition that it shall be used for no other purpose, and, secondly, that only the surface of the land coloured blue on plan B is demised, and that the defendant company has placed the main in the plaintiff's soil underneath such surface. In my opinion, neither of these contentions is well founded. As to the first contention, it no doubt appears from a perusal of the lease that the primary purpose for which the surface of the blue land was demised was that of a mineral railway, but it was demised to the defendant company without any exception or reservation in favour of the lessor and, in the absence of any such exception or reservation and in the absence of any covenant not to use it for any purpose other than the mineral railway, I am of opinion that the demise carries with it the right to occupy and use the surface for any purpose not inconsistent with the user of it for a mineral railway. In my opinion, neither the liberty granted by cl. 8, to construct use and maintain a mineral railway on the surface of the land, nor the statement in cl. 15, that the surface of the land was demised for the purpose of the mineral railway has, or taken together, have the effect of implying a prohibition of the user of such surface for any other purpose. It is well established that, if a lessor desires to except or reserve any interest or benefit in the subject matter of the demise, he must do so in clear terms, and that the Court will not readily

(1) [1904] A. C. 304.

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imply any such exception or reservation in the absence of express words, more especially where, as here, the lease contains express exceptions and reservations.

The second contention that the main was laid in the plaintiff's soil underneath the surface raises the question what depth of soil passed to the defendant company by the demise of the surface of the land coloured blue on plan B ?

The expression " surface of land " is a flexible expression and, according to the context in which it is used, may, at one end of the scale, bear the very restricted meaning of the mere vestimenta terrae, and at the other end of the scale, the very wide meaning of the whole of the soil down to the centre of the earth, except mines, and the whole height above ground usque ad coelum : see MacSwinney on Mines, 5th ed., p. 23. Between these two extremes the expression may be used to denote so much depth of soil and so much height above the ground, as may be required for the particular use in the contemplation of the parties. Therefore, where the expression is used in a grant, it seems to me necessary to ascertain whether the grant indicates the purpose for which the surface of the land is granted, because, in the absence of any other statement as to the depth and height granted, that purpose will govern the quantum of the grant. In the present case, there is no difficulty in ascertaining the purpose for which the land coloured blue on plan B was demised, as this is clearly indicated—namely, a mineral railway. Therefore I am of opinion that the demise of that surface includes so much depth of soil and so much height above as is required for the ordinary purposes of constructing and working a mineral railway, including so much soil as may be required to be removed in order to level up the land and also such depth of soil as may be required for the laying of any necessary or convenient pipes to drain the demised land and to supply water for any steam engines or other machinery used in working the railway. Now, the main which is complained of in this action, is laid about 18 inches below the actual surface of the land, i.e., not any deeper than an ordinary drain or water pipe would be laid. That being so, I am of

opinion that the main has been laid in the demised land and that, as the laying and maintenance of the main is not inconsistent with the user of the land for a mineral railway, the plaintiff is not entitled to have it removed.

The only remaining question to be determined is whether the defendant company has exceeded its rights under the lease by carrying over the mineral railway certain materials which were required for the erection of cottages, churches, a school, a doctor's residence and other buildings intended to form a mining village now in course of construction near the Llay Main Colliery.

By cl. 8 of the lease it is stipulated that the mineral railway is to be used by the defendant company solely for the purposes of the colliery working the demised minerals and of the lessees and for such other purposes as are in the lease specifically authorized. [His Lordship then stated the facts concerning the carriage by the defendants of building materials over the mineral railway for the purposes of the mining village, and continued :] It is not suggested that such carriage is specifically authorized by the lease; and the only question is whether it can properly be said to be a user of the mineral railway for the purposes of the colliery or of the lessees within the meaning of cl. 8. In my opinion, it would be unduly stretching the language of this clause, if I were to hold that it extended to the carriage of goods for third parties, even though such goods were destined to be used in the erection of buildings, some of which were to be acquired by the defendant company for the benefit of its employees.

The fact that the Association was promoted and that its affairs are conducted by the directors of the defendant company does not, in my opinion, help the defendant company's case, as the two bodies are distinct entities. Moreover, at the time of carriage, the true owners of the goods were, in every instance, the builders, who—although no doubt they intended to use the goods in the erection of the buildings in question—were under no obligation to any one to so use them and might, if they had thought fit, have utilized them elsewhere or sold them on arrival or otherwise dealt with them. In these

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circumstances, I am of opinion that it cannot properly be said that in carrying the goods for the builders the defendant company was using the mineral railway for the purposes of the colliery or for its own purposes.

In the result, I hold that the plaintiff is entitled to a declaration that the defendant company is neither entitled to take and use water from the river Alyn for the purposes of the Llay Main Colliery, nor to carry on the mineral railway building materials belonging to builders employed in the construction of buildings at the mining village now in course of erection near the Llay Main Colliery.

As the plaintiff has expressed his willingness to come to an arrangement with the defendant company, I do not propose to grant any injunction at present, but will give the plaintiff liberty to apply for an injunction and for an inquiry as to damages and generally as he may be advised.

As the plaintiff has substantially succeeded, I think the defendant company ought to pay the general costs of the action. I therefore propose to make an order that the defendant company do pay to the plaintiff the costs of the action up to and including this judgment, except so far as such costs have been increased by the claim in respect of the laying of the water main in the land coloured blue on plan B, which excepted costs must be paid by the plaintiff to the defendant company with the usual set-off: any subsequent costs will be dealt with, if and when the occasion arises. The plaintiff is also entitled to have the 34*l.*, paid into Court by the defendant company, paid out to him in satisfaction of any damages he may have suffered in respect of the matters in respect of which it was paid into Court.

Solicitors: *Faithfull, Owen & Fraser; Johnson, Weatherall, Sturt & Hardy, for Parker Rhodes & Co., Rotherham.*

H. C. H.

In re ABERGAVENNY SETTLED ESTATES.

MARQUESS OF ABERGAVENNY *v.* NEVILL.

RUSSELL J.

1926

Feb. 25, 26.

Revenue—Estate Duty—Estate settled by Act of Parliament and rendered inalienable—Moneys deposited with Inland Revenue before Assessment—Option to raise and pay Duty out of Corpus—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 5, *sub-s.* 5—*Finance Act*, 1922 (12 & 13 *Geo.* 5, *c.* 17), *s.* 44.

Where the formal assessment of estate duty on an inalienable estate settled by Act of Parliament is not made until after the passing of the Finance Act, 1922, although sufficient moneys have before the passing of the Act been paid over to the Inland Revenue, the duty is still unpaid within the meaning of s. 44 of the Act and, at the option of the tenant in tail in possession, may be raised and paid out of the corpus of the settled estate. A person entitled to a rentcharge on such an estate under a private Act of Parliament which gives the owner for the time being of the estate the right to create a rentcharge is not entitled to exercise a similar option. The estate duty is payable out of the rentcharge itself.

Adjourned Summons.

The plaintiff, a person of unsound mind not so found by inquisition, appeared by his brother, the committee of his estate. The plaintiff was tenant in tail male in possession under a settlement made by a private Act of Parliament (2 & 3 Ph. & M., No. 22) of an inalienable estate. The late Marquess, who died on December 12, 1915, under the powers given him by the Earl of Abergavenny's Private Estates Act, 1864, had created rentcharges in favour of certain of his children. In order to avoid payment of interest, and under the impression that the estate duty on the inalienable estates was to be aggregated with other property passing on the death of the late Marquess, sums out of income amounting to 57,608*l.* 2*s.* 2*d.*, and the sum of 20,000*l.* out of capital moneys received from sales, were from time to time paid over to the Inland Revenue. As a result of the decision in *Nevill* v. *Inland Revenue Commissioners* (1) 15,756*l.* was returned to the trustees. In the accounts kept by the Inland Revenue interest on the money was credited to the estate on one side of the account and interest on the duty

(1) [1924] A. C. 385.

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debited on the other. No assessment of duty was made until 1925. The plaintiff claimed that the whole of the estate duty payable on the death of the late Marquess in respect of the interest of the plaintiff in the Abergavenny settled estates was in fact unpaid on July 20, 1922, the date of the passing of the Finance Act, 1922, and that s. 44 of that Act gave him the option to raise and pay the duty out of the corpus of the settled estates. The summons asked (1.) for a declaration to that effect, and (2.) whether such part of the estate duty which became payable on the death of the late Marquess in respect of the life rentcharges as remained unpaid on July 20, 1922, was at the option of the person entitled to the rentcharge to be raised and paid out of the corpus of the settled estates or only out of the rentcharges themselves.

F. E. Farrer for the trustees of the settled estates.

Preston K.C. and *Rawlence* for the plaintiff. It is submitted that the duty in respect of the interest in the Abergavenny estates which passed to the plaintiff on the death of the late Marquess was unpaid on July 20, 1922, and was so treated by the Inland Revenue, as appears from their accounts. Therefore the plaintiff, under s. 44 of the Finance Act, 1922, has the option of raising and paying the duty out of the corpus of the settled estates.

This case is covered by *In re The Bolton Estates* decided by Russell J. in 1924. That case was not reported, but the affidavits and the order, which I have here, show that that case is indistinguishable from this. Your Lordship held that where the formal assessment was not made until after the passing of the Act, although before the passing of the Act sufficient moneys to cover the duty as assessed had been paid over to the Inland Revenue, the duty was still unpaid within the section. In this case there was no assessment until 1925, and therefore the estate duty was in fact unpaid on July 20, 1922, and the option is exercisable.

Bennett K.C. and *Byrne* for Lord Guy Nevill, a person entitled to a reversionary interest in the estates. The

correspondence between the Inland Revenue and the trustees shows that these payments were made on account of estate duty and not merely deposits, as in *In re The Bolton Estates*. The language points to the fact that the money had passed in order to satisfy the liability of the plaintiff to the Crown.

Baden Fuller for a person entitled to a rentcharge. According to the rule in *In re Parker-Jervis* (1) a person entitled to a rentcharge is treated as the life tenant of so much of the property as is sufficient to produce the rentcharge. The duty on the whole estate is a charge on the corpus and is payable by the person accountable under s. 8, sub-s. 4, of the Finance Act, 1894. The result is that the person entitled to the rentcharge does not pay any portion of the duty himself, but pays interest on so much thereof as is properly attributable to the portion of the property of which he is ex hypothesi life tenant.

Alternatively by s. 44, in the case of an inalienable estate settled by Act of Parliament, "the property passing on the death of any person in possession of the lands and chattels shall be the interest of his successor in the lands and chattels, and such interest shall be valued, for the purpose of Estate duty, in like manner as for the purpose of Succession duty." On the death of the late Marquess the property which passed was twofold—namely, the interest of the plaintiff as tenant in tail and the interest of the persons entitled to the rentcharge as notional tenants for life who took a slice out of the inalienable estate. All of them were successors within the meaning of s. 44, and therefore the persons entitled to the rentcharges are entitled to exercise the option to have the duty payable under s. 5, sub-s. 5, of the Finance Act, 1894, and still unpaid at the passing of the Finance Act, 1922, raised and paid out of corpus.

J. E. Harman for a person entitled to a similar rentcharge argued to the same effect.

Bennett K.C. and *Byrne* for Lord Guy Nevill. The option

(1) [1898] 2 Ch. 643.

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is only exercisable where the estate duty is payable under s. 5, sub-s. 5, of the Finance Act, 1894. The sub-section is concerned with land so settled by Act of Parliament that none of the persons successively in possession can alienate it. These rentcharges are not land so settled as to be inalienable. They owe their origin to the Earl of Abergavenny's Estates Act, 1864, which gave the tenant in tail for the time being a limited right of alienation—namely, a right to create rentcharges, and are themselves alienable. Sect. 44 of the Finance Act, 1922, does not apply to such a case, and accordingly the persons entitled to the rentcharges cannot require the estate duty to be raised and paid out of the corpus of the settled estates.

RUSSELL J. I am unable to distinguish the facts of this case from the facts in *In re The Bolton Estates*, an unreported case in 1924, the decision in which is attributed in Hanson's Death Duties to Romer J., but for which I am entirely responsible. In that case I held that there had been no payment of the duty within the meaning of s. 44 of the Finance Act, 1922, but that the revenue had been put in possession of a fund in order that they might be in a position to pay themselves when the duty was assessed. Notwithstanding the distinction which Mr. Bennett has sought to draw between the facts of that case and the facts of this, in my opinion they are substantially alike. The same position of affairs prevailed in both.

In this case there was great delay in assessing the duty, and sums were paid from time to time by the tenant for life to the revenue as deposits on account of the estate duty and succession duty, so that when ultimately the amount of the duty was ascertained they would have a fund available out of which to pay themselves the amount of the duty. That that is the true view is borne out by the document signed by a Principal Clerk at the Inland Revenue in which the money is treated as on deposit, and interest is credited to the estate on one side of the account and interest on the duty is debited on the other. In these circumstances it

seems to me that there was no payment within s. 44 of the Finance Act, 1922. At the crucial date, July 20, 1922, the estate duty was unpaid, and therefore the tenant for life, acting through his committee, was and is entitled to exercise the option given to him by the section. I accordingly declare that the estate duty payable under s. 5, sub-s. 5, of the Finance Act, 1894, was unpaid at the date of the passing of the Finance Act, 1922, and that it may be raised and paid out of the corpus of the settled estate.

The second question is whether the estate duty payable in respect of the rentcharges remained unpaid on July 20, 1922, and whether the persons entitled to the rentcharges may exercise a similar option and have the amounts raised out of the corpus of the settled land. They admit that under the decision in *In re Parker-Jervis* (1) they would be liable to be charged interest on that amount. In order to establish that they are entitled to exercise the option they must bring themselves within the words of s. 44 of the Act of 1922, and they have failed to do so. The duty referred to in s. 44 is duty payable in respect of the land or any interest therein under s. 5, sub-s. 5, of the Act of 1894, but the duty payable in respect of the rentcharges is not payable under that sub-section. The sub-section provides: "Where any lands or chattels are so settled, whether by Act of Parliament or royal grant, that no one of the persons successively in possession thereof is capable of alienating the same, whether his interest is in law a tenancy for life or a tenancy in tail, the provisions of this Act with respect to settled property shall not apply, and the property passing on the death of any person in possession of the lands and chattels shall be the interest of his successor in the lands and chattels, and such interest shall be valued, for the purpose of Estate duty, in like manner as for the purpose of Succession duty." The lands in question here were settled by the Act of Philip and Mary, No. 22, in such a way that none of the persons successively in possession was capable of alienating them. The rentcharges do not arise

(1) [1898] 2 Ch. 643.

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under that Act but under the Earl of Abergavenny's Estates Act, 1864, an Act which gave to the owner for the time being of the settled estates a limited right of alienation under which he created the rentcharges which are themselves capable of alienation. The rentcharges do not come within s. 5, sub-s. 5. They are not lands settled by Act of Parliament so that no one of the persons successively in possession thereof is capable of alienating them. The persons entitled to the rentcharges do not come within the class of persons who, by s. 44 of the Act of 1922, are given the right to have the duty raised out of corpus. Whether the slice theory is adopted or not the position must be the same. Assuming that estate duty is chargeable in respect of the rentcharges it is not estate duty payable under s. 5, sub-s. 5, of the Act of 1894. I accordingly declare that the persons entitled to the rentcharges are not entitled to have the amount of the duty remaining unpaid on the passing of the Act of 1922 raised out of the corpus of the settled lands, and that the estate duty is payable out of the rentcharges themselves.

Solicitors: *Williams & James; Hasties; Farrer & Co.; Lee & Pembertons; Evans, Barraclough & Co.*

J. B. B. M.

In re JAUNCEY.

BIRD *v.* ARNOLD.

[1925. J. 1046.]

RUSSELL J.

1926 *March* 10, 11.

Statutes of Limitation—Mortgage of a reversionary Interest in a mixed Fund —Real Property Limitation Act, 1874 (37 & 38 *Vict. c.* 57), *s.* 8.

A person entitled under a will to a reversionary interest in a residuary trust fund, consisting of the proceeds of personalty and of land devised upon trust for sale, mortgaged his interest to secure the repayment of a sum of money. No interest was paid and no acknowledgment of the debt given within twelve years from the date when the principal money became due. The mortgagor died insolvent, and his interest in the fund was claimed by his trustee in bankruptcy, on the ground that the rights of the mortgagee were statute barred, and by the mortgagee, who contended his rights were not barred:—

Held, that the mortgagee's right against such part of the fund as consisted of the proceeds of the sale of land was barred by the Real Property Limitation Act, 1874, s. 8, but that he was entitled to enforce his security against so much of the mortgagor's interest in the fund as consisted of personalty.

Adjourned Summons.

Under the will of the testator, a residuary trust fund was constituted which consisted partly of personal estate in the ordinary sense of the words and partly of the proceeds of the sale of land devised by the will upon trust for sale. Harold Trinder was entitled to a share in the fund expectant on the death of his mother, who was tenant for life. On March 24, 1904, he executed a mortgage of his reversionary interest to secure a sum of 500*l*. He covenanted to repay that sum on September 24, 1904, with interest at 5 per cent., and, if the sum were not so repaid, to pay interest at 5 per cent. by equal half-yearly payments on March 24 and September 24. The deed provided: "And it is hereby agreed and declared that if and so often as any interest due under the covenant hereinbefore contained or this present provision shall be in arrear for twenty-one days after the day appointed for the payment thereof, such interest shall be treated as an accretion to the capital moneys hereby secured as on the day on which the same ought to have been paid, and shall thenceforth

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bear interest payable at the rate and on the days aforesaid, and this security shall extend to such capitalized interest in all respects." No payment of interest was in fact made, nor was any acknowledgment given within twelve years after September 24, 1904, when the principal money became due, according to the tenor of the deed, or at any subsequent time.

Harold Trinder died insolvent, and the question was whether his trustee in bankruptcy or the mortgagee was entitled to his share in the fund. The summons asked whether the plaintiff, the sole surviving trustee of the will, was entitled to treat the mortgagee's right against the fund as statute barred. Sect. 8 of the Real Property Limitation Act, 1874, provides: "No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit or proceeding shall be brought but within twelve years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given."

Norman Daynes for the surviving trustee of the will.

G. B. Hurst K.C. and *Adams* for the trustee in bankruptcy of Harold Trinder. This is a mortgage of a reversionary interest in a mixed fund consisting partly of personalty and partly of the proceeds of the sale of land. So far as the fund consists of the sale of realty the mortgagee's right is statute barred: *In re Fox* (1); *In re Witham.* (2) So far as the fund

(1) [1913] 2 Ch. 75. (2) [1922] 2 Ch. 413.

consists of personalty the statutes of limitation do not apply, but the fund being an indivisible security for one indivisible debt, when the mortgagee's right to enforce his security against the land has gone, his right to enforce it against the personalty has also gone: *Charter* v. *Watson*. (1)

By s. 8 of the Real Property Limitation Act, 1874, no action, suit, or other proceeding shall be brought to recover any sum of money secured by mortgage upon land. This is a sum of money secured by mortgage upon land and, as the words of the section must be read literally, the debt is irrecoverable after twelve years, even if only a small portion of the security consists of land: *Sutton* v. *Sutton*. (2)

Morton for Mrs. Arnold, entitled to a share in the fund which she had mortgaged. Sect. 8 of the Real Property Limitation Act limits the personal remedy on the covenant in a mortgage deed as well as the remedy against the land to twelve years: *In re Turner*. (3) The principle upon which the law is based is either actual or presumed satisfaction, or such delay on the part of the creditor as will lead the debtor to believe that he will not be called on to pay, and it is absurd to say that when you get rid of the greater, the security upon the land, you nevertheless retain the lesser, the personal liability to pay: per Jessel M.R. in *Sutton* v. *Sutton*. (4) If the personal liability is satisfied the debt is extinguished. When land and pure personalty, for example, policies of life insurance, are made a joint security for the payment of a mortgage, if the mortgagee's remedies in law and equity against the land and the mortgagor personally are barred, they are also barred against the pure personalty included in the mortgage: Strachan's Law of Mortgages, 1909 ed., p. 109; *Charter* v. *Watson* (1); *In re Jordison*. (5)

C. Church for a person who, it was admitted, was entitled to a share in the fund.

Greenland for the mortgagee. The mortgage deed provides that if the interest is twenty-one days in arrear it shall be

(1) [1899] 1 Ch. 175.
(2) (1882) 22 Ch. D. 511, 516.
(3) [1917] 1 Ch. 422, 429.
(4) 22 Ch. D. 511, 517.
(5) [1922] 1 Ch. 440, 456.

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treated as an accretion to the capital moneys and shall thenceforth bear interest. In the case of a mortgage of a reversionary interest with such a provision the mortgagee is deemed to have lent to the mortgagor the amount of interest in arrear, and the mortgagor is deemed to have repaid it to the mortgagee: *In re Morris.* (1)

As the mortgagor is deemed to have paid the interest in each case when the interest is twenty-one days in arrear, the mortgage debt can never be statute barred. It is not necessary that there should be an actual payment of interest under s. 8, it may be a notional payment only: *In re Hawes* (2); *In re Dixon.* (3)

In the alternative, so far as the fund consists of personalty the right of the mortgagee is not barred, because there is no statute of limitation that applies to a mortgage of personalty: *In re Witham* (4); *In re Hancock* (5); *In re Lake's Trusts.* (6)

Sect. 8 of the Real Property Limitation Act, 1874, operates only as a suspension of the remedy, the debt itself is not extinguished: *Kibble* v. *Fairthorne.* (7) That the debt is not extinguished is shown by the fact that an acknowledgment after the statutory period has expired is sufficient: *In re Lord Clifden.* (8)

RUSSELL J. The question is whether the mortgagee's right to so much of the trust fund as is composed of the sale of realty is barred, and, if it is so barred, whether his right is also barred against the balance of the fund which is ordinary personal property. Sect. 8 of the Real Property Limitation Act, 1874, provides: [His Lordship read the section.]

Mr. Greenland, who appeared for the mortgagee, put his case in two ways. His first point was that the section did not apply to the present case because the mortgage contained a provision for the capitalization of interest. He contended that no mortgage which contained such a provision could ever be barred under the section. The only foundation for

(1) [1922] 1 Ch. 126.
(2) (1892) 62 L. J. (Ch.) 463.
(3) [1900] 2 Ch. 561.
(4) [1922] 2 Ch. 413.
(5) (1888) 59 L. T. 197.
(6) (1890) 63 L. T. 416.
(7) [1895] 1 Ch. 219, 224.
(8) [1900] 1 Ch. 774.

that argument, which I confess is to me a complete novelty, is a passage in the judgment of Younger L.J. in the case of *In re Morris*. (1) In that case the next of kin of a living lunatic, from whom they had certain expectancies, borrowed from a society the sum of 20,000*l*. In consideration of that advance they conveyed by way of mortgage their expectancies in the estate of the lunatic subject to redemption on payment to the society by the mortgagors, at any time after the death of the lunatic, of the sum of 40,000*l*. with compound interest at the rate of 4½ per cent. per annum with yearly rests from the date of the death of the lunatic. The lunatic's estate was being administered by the Court and the 40,000*l*. had been paid off. The question raised was whether on paying off the mortgage the mortgagors were entitled to deduct income tax from the date of the death of the lunatic. The mortgagees contended that all that could be deducted was the tax upon the interest for the last year, if that were paid in the last year, because "compound interest" meant that at the end of each year, when the rest was taken, any interest overdue became capital, and therefore when it was paid to the mortgagees it was a repayment of capital and not of interest.

The Court held that upon the true construction of the deed there had been no capitalization, and, therefore, the mortgagors were entitled to have the income tax deducted. That was the decision. Younger L.J., in delivering judgment, having agreed with the rest of the tribunal upon that matter, and having decided the case upon the ground that upon the true construction of the deed there was no capitalization of interest, then went on to deal with the question upon the assumption that, contrary to his opinion, and contrary to his decision, the interest had been capitalized. His remarks therefore were really only obiter when he said: "The question then arises, what is the sum which is so capitalized in every year? In my judgment, on the true construction of this deed, it is that sum and no more than that sum which would in respect of interest have been then payable to the mortgagees if the

(1) [1922] 1 Ch. 126, 138.

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deed, in place of permitting it in effect to be added to the principal, had directed it to be paid to them. It would seem that on this present assumption one of two possible transactions may on analysis be said to be elliptically provided for by the provision in question. It may be said that the provision is in effect one by which the mortgagors submit to the addition in every year to the principal then secured by the mortgage of a further capital sum equal to $4\frac{1}{2}$ per cent. of that capital, or it may be said that the provision is in effect one under which the mortgagees relend to the mortgagors the interest which is treated as having been first paid to them. I cannot myself see how the appellants can even on the present assumption succeed unless they are able to establish that the first and not the second of these transactions is that which is really carried out by the provision in question. But I cannot myself doubt that the second and not the first of these operations more closely approximates to what is actually effected by the words used." That is the whole foundation for Mr. Greenland's argument. Younger L.J. does not purport to state the true position in the case of a provision of the character in question. If he did, it would really amount to a travesty of the actual facts; because in the case of such a provision as is contained in the present deed, which enables the interest to be capitalized, the interest is not capitalized because it is in fact paid, but because it has in fact not been paid. In my opinion there is no foundation for Mr. Greenland's very ingenious contention, which I do not think would ever have been put forward but for the language used in the Court of Appeal in the case of *In re Morris*. (1)

Mr. Greenland then concedes, and in my opinion rightly, that if he is wrong upon that first point, he cannot resist the contention that so far as this fund is composed of the proceeds of the sale of real estate, he can have no claim against it. In my opinion that concession is rightly made, in view of the decisions which have been given in the cases of *In re Fox* (2) and *In re Witham*. (3)

(1) [1922] 1 Ch. 126. (2) [1913] 2 Ch. 75.
(3) [1922] 2 Ch. 413.

But he then contends that although his remedy against the fund, so far as it consists of the proceeds of sale of real estate, is barred, he is entitled to enforce his security against so much of the fund as consists of personal estate. On the other hand it has been contended that the section must be read strictly, and that so read it applies to any mortgage, or at all events to any mortgage in which there is included no matter how small a parcel of real estate, so that if once the remedy of the mortgagee against the real estate is barred, ipso facto the remedy is also barred against any fund included in the mortgage which is composed of personal estate. Reliance was placed upon the language used by Sir George Jessel M.R. in *Sutton* v. *Sutton*. (1) In that case the Court of Appeal held that the limitation of twelve years imposed by the Real Property Limitation Act, 1874, s. 8, to actions and suits for the recovery of money charged on land applied to the personal remedy on the covenant in a mortgage deed as well as to the remedy against the land. In the course of his judgment Sir George Jessel analysed the language of the section from that point of view. That was all he was directing his attention to. He does use language which, divorced from the context, would afford some justification for the suggestion that the section applied to any mortgage. He says: "Now the words that are material are: 'No action, suit, or other proceeding shall be brought to recover any sum of money secured by any mortgage.' It is impossible to say that those words do not include this sum of money. It is a sum of money secured by a mortgage. Those who say that these words are not to be read literally must show some reason why they should not. What they say is that it does not mean to recover any sum of money secured by a mortgage, but that it means to recover the money so far as it can be recovered by a sale of land or by the receipts of the rents; that is to say, so far as you can get it out of the land." Pausing there, down to that point it appears to me abundantly plain that the Master of the Rolls is simply considering the question whether the right to sue and recover in the case of

(1) 22 Ch. D. 511, 516, 517.

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a mortgage of land, where the mortgage is barred, still subsists. But he does use this phrase, which was relied upon: "Then there is this observation to be made. The principle on which the law has always been based is either actual satisfaction or presumed satisfaction, or such delay on the part of the creditor as entitles the debtor to believe that he will not be called upon to pay. It seems absurd that you should get rid of the greater, so to speak, namely, the security upon the land, and should nevertheless retain the lesser, namely, the personal liability to pay. The result, to my mind, would be too absurd. It is not a decisive or conclusive reason, but it is a reason." That passage is relied upon as deciding, or at all events expressing the view, that not only was the mortgage barred, but that the whole debt had been destroyed and ceased to exist. In my opinion that is not the correct interpretation of the words. They do not amount to more than this: that the right to the mortgage is gone and the right to sue is gone, but the Master of the Rolls is not there in terms deciding that although the right to sue may be gone, the debt may not still be in existence. In my opinion, those remarks of Sir George Jessel do not justify me in holding that where under this section the right to enforce the mortgage against the land is barred, at the same time there must necessarily be barred the right to enforce the mortgage against any personal estate which is included in the security.

The argument was based not only upon the remarks of Sir George Jessel, but also upon the decision of Kekewich J. in *Charter* v. *Watson* (1), where he applied the principle to the converse case, and held, for reasons appearing in that decision, that where the mortgagor's right to redeem land was gone, his right to redeem personal estate included in the same security was also gone. The learned judge based his decision upon grounds which do not apply to the present case. But what weighs with me is the decision of Sargant J. in *In re Witham.* (2) That was a case of a mixed fund, as here. It was also a case in which it was held that the right against

(1) [1899] 1 Ch. 175. (2) [1922] 2 Ch. 413, 415, 423.

so much of the mixed fund as was derived from the proceeds of sale of real estate was barred. But at the same time the learned judge directed an inquiry to ascertain the respective values of the two classes of debts, and payment was directed to be made to the mortgagee of his debt out of so much of the mixed fund as was composed of personal estate other than the proceeds of the sale of land. It is true that that decision was founded upon an admission made during the course of the argument. The admission is in these terms: "At the hearing of the summons, it was admitted, on behalf of the legal personal representatives of C. E. Witham, that the debt was not barred as against the personal estate of the testator, and the question of interest was whether the debt was barred as against the proceeds of sale of the real estate." Sargant J., as I read his judgment, approved of that admission. In commenting upon the result of the authorities which forced him to come to the decision to which he came much against his will, he makes this statement: "One gets to this extraordinary result, that if this were a mortgage of land itself the right would not be barred under *Hugill* v. *Wilkinson* (1); if it were a mortgage of the personalty, which the proceeds of sale of land are held to be for many purposes, it would not be barred, because there is no statute of limitation applying to a mortgage of personalty." True it is that he does not there refer to a mixed fund, but I read his remarks as of general application, and it certainly would appear strange that where there is no statute of limitations applicable to a mortgage of personalty, the mortgagee's rights under a mortgage the bulk of which was personalty, but which happened to contain also a small piece of land as part of the security, should be wholly barred by s. 8. In my opinion the equitable view to take is that although the right of the mortgagee to the land is barred, he is not barred from his right to enforce the security so far as he may against any personal estate comprised in the security, and available.

The result is that I decide here that to this fund, so far as it is composed of the proceeds of sale of real estate, the

(1) (1888) 38 Ch. D. 480.

RUSSELL J. 1926 JAUNCEY, *In re.* BIRD *v.* ARNOLD.

mortgagee has no claim; but so far as it is composed of personalty other than land, the mortgagee is entitled to be paid out of Harold Trinder's share, so far as it will extend.

Solicitors: *Bird & Bird; Tarry, Sherlock & King; Morris, Ward-Jones, Kennett & Co.; W. Crimp & Co., for Kitsons, Hutchings, Easterbrook & Co., Torquay; Wood, Nash, Hewett & Riddett, for G. H. Hext, Torquay.*

J. B. B. M.

TOMLIN J. 1926 *Feb.* 25, 26.

MELZAK *v.* LILIENFELD.

[1925. M. 2236.]

Vendor and Purchaser—Leaseholds—Grant of Underlease—Contract for Tenancy of Flat—No Notice to Tenant of any unusual Covenants in Head Lease—Lease containing special Restrictions—Tenant entitled to Underlease with usual Covenants only—Breach of Contract—Damages.

Upon a contract between the owner of a leasehold interest and a proposed tenant for the grant of an underlease to the tenant, in the absence of any term to the contrary, and in the absence of any evidence that the proposed tenant has in fact had actual notice of the terms of the lease and the covenants by the lessee therein contained, the tenant is entitled to an underlease containing the usual covenants only, and is not bound to accept an underlease subject to any unusual covenants which may be contained in the head lease.

The plaintiff, who was a professional musician, made a contract in writing with the defendants for the grant to him of an underlease of a London flat for a term of five years at a rent of 160*l.* a year. The plaintiff knew that the defendants were lessees, but he had no notice of, and no reasonable opportunity of ascertaining the contents of their lease, which contained, besides the usual covenants, restrictive covenants which would have made it impossible for him to use the flat for the purpose of giving music lessons, which was part of his professional work. The plaintiff refused to accept an underlease subject to all the covenants of the head lease, and requested one subject only to the usual covenants. The defendants refused to comply, and subsequently let the flat to another tenant:—

Held, in an action for specific performance and damages, that the plaintiff was entitled to an underlease subject only to the usual covenants, and there having been a breach of contract by the defendants, the plaintiff was entitled to damages.

Reeve v. *Berridge* (1888) 20 Q. B. D. 523 and *Hyde* v. *Warden* (1878) 3 Ex. D. 72 applied.

WITNESS ACTION.

The plaintiff claimed specific performance of an agreement in writing dated June 16, 1925, whereby the defendants agreed to let to him the first floor of No. 167 Maida Vale, as a self-contained flat for a term of five years and twelve weeks at a yearly rental of 160*l.*, and to sell to him certain fittings therein contained and mentioned in a schedule to the agreement, and damages for breach of contract. The defendants by their defence denied that the whole contract was contained in the document of June 16, and pleaded that two previous memoranda signed by the parties must be added to constitute the complete contract, that the contract was one for an underlease subject to the same covenants as those in defendants' lease of the premises, that the defendants had forwarded a draft lease containing such covenants to the plaintiff's solicitor, who had refused to accept it, on the ground that some of the covenants in the head lease were unusual and would have prevented him from giving music lessons in the said flat. The plaintiff required the flat not only for residence therein, but for the purpose of giving music lessons, and contended that on the true construction of the contract he was entitled to an underlease subject only to the usual covenants.

The defendants held the property under a lease dated August 1, 1842, which contained a number of restrictive covenants, among others not to do or suffer upon the demised premises any act which might be or grow to be an annoyance, damage, or disturbance to the lessors or their assigns or tenants, and to keep and use the premises as a private dwelling-house only.

The following statement of facts is substantially taken from the judgment of the learned judge :—

"This is an action for relief in respect of an agreement to take a flat in Maida Vale. The plaintiff in the action is a professional violinist; and in the month of April, 1925, being then engaged to be married, and looking out for suitable premises in which to establish himself in married life, he happened to observe an advertisement board outside

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No. 167 Maida Vale, intimating that part of the premises were to be let as a maisonnette. He apparently visited the premises, and got into communication with the occupants, who were the defendants, Mr. Lilienfeld and his wife.

There seems to have been some discussion which made it plain to the plaintiff that the premises being offered, and the rent at which they were being offered, were both bigger than what he desired, either to occupy or to pay; and some suggestion was made as to the possibility of reducing the premises to be let, by turning the first floor into a self-contained flat. Now, after the first interview between the plaintiff and the defendants, the matter seems to have been taken up by the prospective father-in-law of the plaintiff, Mr. Charles Joel, who thereafter conducted the business on his behalf. Mr. Joel had a number of interviews with the defendants, and on June 1, apparently after some discussion with Mr. Lilienfeld, Mr. Joel prepared two documents, each of which was signed by him and by Mr. Lilienfeld. The first document is: 'I agree on behalf of Mr. Anatole Melzak, to rent the first floor situated at 167 Maida Vale, subject to your obtaining the renewal of the lease of these premises, for a period of five years from the date of possession, and your carrying out the necessary alterations, etc., at an inclusive rental of 160*l.* per annum. Subject to usual tenancy agreement. And further to pay you the sum of 55*l.* for the fittings as already in these rooms.' And that was signed 'For and on behalf of A. Melzak, Charles Joel'; and then there was the signature of Mr. Lilienfeld added to it. The other document was in these terms: 'Subject to my obtaining the renewal of the lease of 167 Maida Vale, I undertake to let to you, Mr. A. Melzak, the first floor self-contained flat at these premises for a period of five years, at the inclusive rental of 160*l.* per annum; and to sell you the various fittings in the rooms for the sum of 55*l.*, and to carry out the alterations to the rooms as agreed.' This is signed by both parties.

What was the purpose of these two documents, and why

they were in different form, I am entirely unable to say, or, indeed, to form any judgment. One or two points, however, emerge quite plainly. Mr. Joel, acting on behalf of Mr. Melzak, knew that he was dealing with somebody who held a lease, as the first document is expressed to be 'subject to obtaining the renewal of the lease.' In fact, the position was this. The Lilienfelds held a lease of the property which was due to expire in 1935, or thereabouts. The covenants in that lease prohibited any user other than that of a private residence, and they were in negotiation with the trustees of the Bishop of London's Estate, in which the property was situated, with a view to the surrender of the existing lease, and granting of a new lease, the surrender and fresh grant to take effect from Michaelmas, 1925. The new lease was at an increased rent, with such modifications of the covenants as to enable the premises thereafter to be utilized as several self-contained flats.

The actual figures that appear in the documents of June 1 seem to have been modified from those first suggested, by reason of Mr. Lilienfeld having said that the expense of the alterations which were necessary would prove heavier than he had at first anticipated. That is how the matter stood on June 1. On or before June 16 there was a telephone message from Mr. Lilienfeld to Mr. Joel—and I do not think there is any difference between the witnesses in regard to it—in which Mr. Lilienfeld told Mr. Joel that he wanted him to bring the plaintiff round to settle the matter, because he had now got the necessary sanction from the Paddington Estate for carrying out the arrangement proposed. Up to this stage, I am quite satisfied there was no binding contract of any sort or kind. The documents of June 1 are not sufficiently specific to constitute a contract because, it seems to me, they are uncertain in many respects; and upon the evidence which I have heard, I am satisfied that in the circumstances in which they were entered into, they did not, in fact, constitute a contract at all. But on June 16, as the result of a telephone message, Mr. Joel and Mr. Melzak attended at 167 Maida Vale, and

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there saw the defendants Mr. Lilienfeld and his wife, and on that occasion another document was executed. I may say that Mr. Joel, when answering the telephone message to which I have referred, suggested to Mr. Lilienfeld that he should prepare a schedule of fittings, in order that they might be ready for the final conclusion of the matter at the interview which was being arranged. At any rate, this document was written out by Mr. Joel, and signed in duplicate; one copy was signed by Mr. Lilienfeld and the other by the plaintiff. It is in these terms: 'Mr. and Mrs. W. H. and L. Lilienfeld of 167 Maida Vale, W. 9, agree to let, and Mr. Anatole Melzak of 21 Taviten Street, W.C. 1, to take the first floor flat at 167 Maida Vale, W. 9, of 7 rooms (including bath room and W.C.) for a period of 5 years and 12 weeks commencing from July 15th 1925 and Mr. Melzak agrees to purchase the fittings as per schedule for 55*l.* and has paid a deposit herewith of 20*l.* and will pay the balance of purchase price together with one quarter's rent at 160*l.* 0*s.* 0*d.* per annum inclusive on July 15th 1925.' With that document was a list of the fittings in the first floor flat of 167 Maida Vale. Now, it has been urged upon me by Mr. Galbraith that in order to determine what the contract between the parties is, I have to read the document of June 16 with the documents of June 1. And that as a matter of construction, or as a result of the evidence, I must come to the conclusion that the contract between the parties is contained in those three documents. I do not think that is the proper conclusion to come to. I am satisfied that the document of June 16 was intended to be the contract. I am satisfied of that as a matter of construction upon the documents. But if it were necessary to base my conclusion upon any evidence I have here, I am quite satisfied upon all the admissible evidence to which I have listened, that it was the intention of the parties on June 16 to produce the contract which was to be binding on them, and which was to determine their relations. That which was written and signed on June 1 was intended to be wholly obliterated on June 16,

and that the question of what the contract is, rests upon the document of June 16, and that alone.

What occurred was this: That document having been signed, and the deposit referred to in it having been paid, a few days afterwards Mr. Lilienfeld, possibly having taken some advice, handed to Mr. Joel a document which he invited him to sign, or obtain Mr. Melzak's signature to, which was, in fact, an elaborate agreement for the grant of an underlease containing a number of restrictive covenants to correspond with the covenants of the head lease. Mr. Joel said it was a matter which required consideration, and then, for the first time, he consulted Mr. Melzak's solicitor. As a result of that, some correspondence took place, and I think the first letter to which I need refer is a letter of June 30 from the solicitor of the plaintiff addressed to Mr. Lilienfeld, in which he confirms a conversation which he had that morning with Mr. Lilienfeld on the telephone. He says: 'I beg to refer to our conversation over the telephone this morning when I pointed out to you that the document signed by you, and dated the 16th ulto., is in itself sufficient and no further document is necessary. You intimated that you would prefer a fuller and more formal document, and I informed you that my client, without prejudice to his rights under the document of the 16th instant, would be prepared to consider executing a formal lease containing terms satisfactory to him, subject, of course, to the costs of it being borne by you. I suggested that the better course would be for you to instruct your solicitor in the matter, and this you arranged to do. I return herewith, as requested, the form of lease which you submitted to my client, and I shall be glad if you will acknowledge receipt in due course.—Yours faithfully (signed) J. Prag.' As a result of that, apparently the male defendant, Lilienfeld, consulted his solicitor, and on July 11 the defendant's solicitor enclosed a draft lease to the plaintiff's solicitor. On the 14th the plaintiff's solicitor wrote to the defendant's solicitor acknowledging his letter and enclosing the draft and saying then: 'I have to point out to you that an agreement was entered into between the

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parties dated the 16th ultimo, and that as that agreement governs the terms which are to be included in the lease, there are a number of important objections to the draft with which you have supplied me. First, the draft lease appears to be an underlease, whereas under the agreement of the 16th ultimo, my client is entitled to an original lease. I shall be glad therefore to learn from you that an original lease will be granted. Secondly, under the agreement of the 16th ulto. your client is entitled to require mine to give only technically "usual" covenants. I have therefore deleted from the draft lease covenants that are not of that character. I have to point out that under the agreement of the 16th ulto., my client is entitled to possession as from to-morrow. In reliance upon that agreement, he has determined his tenancy at the address where he now resides, and is under obligation to give up possession to his present landlord accordingly. You will appreciate that if your clients do not give him possession of the above premises in accordance with the agreement, my client will suffer very considerable damage. I return the draft lease amended, and will call with my client at your office at 12 o'clock noon to-morrow for the purpose of completing the matter.' On the following morning, on July 15, the plaintiff apparently attended at 167 Maida Vale, and made a demand for possession, and tendered, I think, the balance of the price of the fittings and a quarter's rent. The tendered payments were declined, and he was refused possession. Later in the day, at 3 o'clock in the afternoon, there was a meeting at the office of the defendant's solicitor, at which there were present the plaintiff, Mr. Joel and his solicitor, the defendant and his solicitor; and there is some conflict of evidence as to what took place. Perhaps it is not unnatural that there should be some obscurity about what occurred on that occasion, inasmuch as the meeting—however concluded—seems to have opened with some heat, which was not, perhaps, calculated to keep the recollections of the parties as clear as they might otherwise have been. There is no doubt, however, that during that meeting there was a discussion of the situation, and that the

plaintiff was prepared to some extent to resile from what he regarded as his strict right if, on the other hand, there were concessions made to him by the defendants. I am not satisfied that there was any concluded agreement arrived at on that occasion. I think the matter which, amongst others, was discussed, was whether there should be inserted in the underlease something which would enable the plaintiff to utilize the premises for the purpose of giving music lessons, that being one of the purposes for which he desired the premises. Now it is, in the view which I take of this case, of no particular relevancy, but I am not satisfied that it was ever brought to the minds of the defendants at an earlier stage, that the premises were in fact going to be used for the purpose of giving lessons. I think they knew that the plaintiff was going to use one of the rooms for a studio for the practice of music, but I am not satisfied that they ever appreciated that in fact it was going to be used as a pupil room. However that may be, the matter was discussed on the afternoon of July 15, and I am not satisfied that there was any agreement concluded. The defendant Lilienfeld says, and his solicitor says, that he did not agree to the insertion of the words with regard to the music lessons, although in fact the words appear in pencil in the draft both of the plaintiff's solicitor and the defendants' solicitor. On the other hand, the defendants' solicitor seems to have inked in afterwards those parts of the pencilling which had been made at the interview which he regarded as agreed, but omitted to ink the particular clause with regard to the lessons. I think that the suggestions were put forward on July 15, and that they were agreed up to a certain point, but that no final conclusion thereon was arrived at on the 15th, and the matter was over. However, on the 16th this letter was received by the plaintiff's solicitor from the defendants' solicitor: 'Mr. and Mrs. Lilienfeld have seen me this morning and tell me it was not until our meeting yesterday that anything was said about Mr. Melzak's wanting to give music lessons. Under these circumstances my clients are not willing to accept him as a tenant, as he was represented to them as being a musical

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artist who played for broadcasting and in chamber music. I am instructed therefore to return the 20*l.* paid as a deposit, and enclose Mr. Lilienfeld's cheque, so that the matter as far as my clients are concerned must be considered as at an end. Mrs. Lilienfeld tells me that on none of the many occasions on which she saw Mr. Joel was anything said about Mr. Melzak's wish to give music lessons—if it had, she would at once have said that the flat could not be let for that purpose. Yours faithfully (signed) H. J. Shepard.'

Mr. Prag, the plaintiff's solicitor, after taking his client's instructions, on July 20 replied in these terms: 'I beg to refer to your letter of the 16th instant, and to my reply thereto of the same date. I have now taken my client's instructions upon the matter referred to in your letter, and I have to inform you that my client joins issue with yours thereon. I return your client's cheque for 20*l.*, which you enclosed with your letter, and I shall be glad if you will acknowledge receipt in due course. Kindly let me know by return if you are prepared to accept service of process on behalf of your clients. (Signed) J. Prag.' And then, I think, after a day or two, the writ was issued, and in due course the matter has come to trial."

Spens K.C. and *H. S. G. Buckmaster* for the plaintiff. The contract is entirely contained in the document of June 16, and no other document should be incorporated in it. That was an open contract for the grant of an underlease to the plaintiff. A vendor cannot force on the purchaser of a lease any lease containing unusual covenants. So a contract to grant an underlease must mean a contract to grant one of property held under a lease subject only to the usual covenants. The question was raised in *Propert* v. *Parker* (1), but left undecided in that case. But it is covered by the decision in *Reeve* v. *Berridge* (2), approving *Hyde* v. *Warden*. (3) Before the defendant can say that the plaintiff has repudiated the contract, he must establish that an underlease

(1) (1832) 3 My. & K. 280. (2) 20 Q. B. D. 523, 527.
(3) 3 Ex. D. 72.

subject to unusual covenants was submitted to the plaintiff. There is no evidence that the plaintiff ever repudiated the contract. On the contrary it was the defendants who wrote saying that, if he wanted the flat for music lessons, they could not accept the plaintiff as a tenant: *Long* v. *Millar*. (1)

Galbraith K.C. and *W. F. Swords* for the defendant. The contract is contained in three documents, the two signed on June 1, and the one signed on June 16. It is for the plaintiff to establish that the parties meant on June 16 to cancel the documents of June 1. The lease to be granted to the plaintiff was, as the plaintiff knew, subject to the head lease. The plaintiff must be taken to have known that the defendant could not possibly grant any underlease not subject to the covenants of the head lease, whether usual or unusual. The defendants have offered him such an underlease, but he has refused to accept it. The plaintiff has repudiated the contract: *Morris* v. *Baron & Co.* (2); *Earl of Darnley* v. *London, Chatham & Dover Ry.* (*Proprietors*). (3)

[TOMLIN J. referred to *Molyneux* v. *Hawtrey*. (4)]

Spens K.C. in reply.

TOMLIN J. [having stated the facts, as above, proceeded:] Now I think the trouble has arisen in this case in the main by reason of the fact that the parties in the first instance regarded themselves as qualified to deal with matters which are naturally of a technical character, and for the sake of saving a few fees endeavoured to avoid introducing expert advisers. Perhaps in the future they may think that it is cheaper in the end to be adequately advised at the beginning.

The question is what are the rights of the parties in the terms of the contract, and it raises a point of some difficulty. I am satisfied, as a matter of fact, that the document of June 16 was entered into with knowledge that the defendants were entitled only to a lease, and that being so, I think the contract must be read as a contract for an underlease. But the question arises whether, treating it as a contract for an

(1) (1879) 4 C. P. D. 450, 456.
(2) [1918] A. C. 1, 18, 33.
(3) (1867) L. R. 2 H. L. 43, 59.
(4) [1903] 2 K. B. 487, 492.

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underlease, it must be treated as a contract for an underlease with covenants appropriate to the covenants of the head lease; or whether it ought to be considered as a contract for an underlease granted out of a lease with usual covenants. The precise point seems never to have been determined. It was propounded by Sir John Leach M.R. in *Propert* v. *Parker*. (1) He, unfortunately, propounded the problem but did not proceed to the solution of it. He states it in this way: There had been a contract with nothing shown on the face of the contract as to whether the grantor was the owner of the freehold, or had only a leasehold interest; and in the result, the Master of the Rolls held that the proposed lessee in that case had no knowledge that the grantor's title was less than freehold. But he says this: "If the defendant had been apprised at the time of the agreement that the plaintiff had only a leasehold interest, the question would then have arisen whether, inasmuch as the lease to be granted to the defendant must necessarily have been subject to the covenants which bound the plaintiff, it was not, on the part of the defendant, such a want of reasonable diligence to neglect to inform himself of the nature of those covenants as in the consideration of a Court of equity would amount to implied notice of the covenants; or whether the defendant not inquiring into those covenants, was entitled to take it for granted that the lease to the plaintiff contained only what are termed usual covenants. That question, however, does not arise in this case."

It is, I think, plain that a contract for the sale of a lease must be treated as a contract for the sale of a lease with usual covenants, unless the grantee has been given full opportunity of ascertaining what the covenants in the lease are, and has been made acquainted, in fact, with the existence of any unusual restrictive covenants. The question is whether the contract should be considered as a contract for an underlease in accordance with the terms of the covenants of the head lease, or as a contract for an underlease granted out of a head lease with usual covenants. Now it was said by

(1) 3 My. & K. 280.

Fry L.J., delivering the judgment of the Court of Appeal in *Reeve* v. *Berridge* (1), that the question was how far the mere notice of the lease in the contract went—and he was dealing there with an action on a contract for the purchase of the lease—without any opportunity of inspecting it, or the agreement for a lease affects the purchaser with notice of all the contents of that agreement. He continued: "This question appears to be really covered by the authority of *Hyde* v. *Warden*. (2) The questions were whether taking possession of property agreed to be underleased with notice of the existence of the lease was a waiver of all objections based on the terms of the lease." The question therefore so far as regards the question of notice was the same as in the present case—and the Court was pressed to decide that notice of the lease was notice of its contents; and that on the authority of various cases, including *Cosser* v. *Collinge* (3), the Court rejected the argument, and said (2): "We think it may be considered that the principle of that case can only be applied where (as indeed was the case in *Cosser* v. *Collinge* (3)) the defendant had a fair opportunity of ascertaining for himself the provisions of the original lease. . . . . It was argued before us that the question in *Hyde* v. *Warden* (2) arose on a contract for a sub-lease, whilst in the present instance the question arises with relation to a contract for the assignment of a lease. But we are of opinion that there is no substance in such a distinction, because in both cases alike the purchaser must know that his vendor can confer on him no interest except one subject to the covenants contained in the lease, and the effect of notice must therefore be alike in both cases. Criticisms on *Hyde* v. *Warden* (2) were also addressed to us, and in particular we were asked to hold it inconsistent with *Grosvenor* v. *Green* (4), which was decided by Lord Hatherley when Vice-Chancellor. But in this Court we are bound by the authority of *Hyde* v. *Warden* (2), and we cannot but observe that there is great practical convenience in requiring the vendor, who knows his own

(1) 20 Q. B. D. 523, 527.
(2) 3 Ex. D. 72, 80.
(3) (1832) 3 My. & K. 283.
(4) (1858) 28 L. J. (Ch.) 173.

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title, to disclose all that is necessary to protect himself, rather than in requiring the purchaser to demand an inspection of the vendor's title deed before entering into a contract, a demand which the owners of property would in some cases be unwilling to concede, and which is not, in our opinion, in accordance with the usual course of business in sales by private contract."

Now, I think the effect of all that is really as follows : That although, speaking generally, if a purchaser has notice of a particular document, he must be taken to have notice of its contents, yet in a contract for the sale of a lease or the grant of a sub-lease out of a leasehold interest, in each of which cases the proposed grantee has notice of the lease, the law is this : that in the absence of any term in the contract to the contrary, and in the absence of any evidence that the proposed grantee has in fact been made acquainted with the actual terms of the lease, the contract must be read and construed as in the one case a contract for the assignment of a lease containing the usual covenants, and in the other case, as a contract for the grant of a sub-lease out of a leasehold interest containing the usual covenants. Applying that principle, if it be right, to this case, I come to the conclusion that on construction this is a contract—that is the document of June 16, 1925—for the grant of a sub-lease out of a leasehold interest which was subject only to the usual covenants.

The question then remains whether there was notice in fact to the plaintiff of the existence of unusual covenants in the head lease. Now, I am unable to say upon any evidence that I have heard, that the actual covenants contained in the lease, or the nature of them, were ever brought to the attention of the plaintiff at all ; and however usual it may be in London houses to have restrictions of that kind, I do not think it is possible to hold that any one who deals with property in London is in a different position from one who deals with property elsewhere ; or that he must be supposed to keep a special look-out for restrictive covenants. If I hold as a fact that there was no notice to the plaintiff of the existence

of unusual covenants in the head lease, what follows from all that? It seems to me quite plain that from start to finish the plaintiff and his adviser were insisting upon the contract which they had entered into as being in fact a binding contract; and that what took place on July 15 is really not material, no agreement, as I hold, being then arrived at. All that took place on July 15 was subject to this: that if nothing came of it, the parties were relegated to their rights under the contract of June 16. Now the contract on June 16 being what it was, and the plaintiff insisting on it, the defendants made it quite plain that they were not in a position to perform it. Indeed, they made it quite plain, I think, by the letter of July 16; and at any rate, they made it quite plain they were not going to perform it, by letting the property at an increased rent to somebody else. It seems to me, therefore, that the plaintiff, who, of course, in this action is suing only in respect of damages for breach of contract, there being no question of specific performance, has established a contract which has been broken by the defendant; and that being so, the action must succeed, and there must be an inquiry as to damages. The costs must be paid by the defendants, but in arriving at that conclusion I am saying nothing which will affect any question as to the measure of damages which may arise upon the inquiry, the costs of which will be reserved.

There will be a declaration that on the true construction of the contract the plaintiff is entitled to the grant to him of an underlease of the first floor flat at 167 Maida Vale, not subject to any unusual covenant, and that the defendants have failed to perform the contract.

Solicitor for plaintiff: *J. Prag.*
Solicitor for defendants: *H. J. Shepard.*

H. L. L.

C. A.
1925
ROMER J.
Oct. 23, 27; *Nov.* 19.
C. A.
1926
Jan. 27.

In re BLYTH SHIPBUILDING AND DRY DOCKS COMPANY, LIMITED.

FORSTER *v.* BLYTH SHIPBUILDING AND DRY DOCKS COMPANY, LIMITED.

[1925. B. 1978.]

Sale of Goods—Shipbuilding Company—Agreement to build Ship—Partly constructed Vessel—"Materials appropriated for her"—Passing of Property—Debenture-holders' Action—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *ss.* 16, 18, *r.* 5 (1.).

A shipbuilding contract provided for payment of the purchase price of the vessel by instalments, the first to be paid on the signing of the contract, the next when the keel was laid, and others at various stages in the progress of the ship's construction. She was to be constructed under the inspection of the purchasers' surveyor, to whose approval the quality of the material used and the workmanship were to be subject. Clause 6 provided that "from and after payment by the purchasers to the builders of the first instalment on account of the purchase price the vessel and all materials and things appropriated for her should thenceforth, subject to the lien of the builders for unpaid purchase money including extras, become and remain the absolute property of the purchasers."

After the first two instalments of the purchase money had been paid and the vessel had been partly constructed, a receiver was appointed in an action commenced by debenture holders of the shipbuilding company for enforcing their security. Upon a summons in that action to determine the respective rights of the plaintiffs and the purchasers:—

Held, by Romer J., that the property in the uncompleted vessel had passed to the purchasers, and

Held, by the Court of Appeal, affirming Romer J., that certain worked material lying in the yard ready to be incorporated into the hull of the vessel and approved by the purchasers' surveyor, had not been "appropriated for her" within the meaning of cl. 6 so as to become the property of the purchasers.

Reid v. *Macbeth & Gray* [1904] A. C. 223, and *Sir James Laing & Sons* v. *Barclay, Curle & Co.* [1908] A. C. 35, distinguished.

Seath v. *Moore* (1886) 11 App. Cas. 350 applied.

SUMMONS.

The following statement of facts is taken from Romer J.'s considered judgment:—

By an agreement dated the 24th November, 1924, and made between the defendants, the Blyth Shipbuilding and Dry Docks Co., Ld. (hereinafter called "the company"), of

the one part, and the respondents, "Cosulich" Società Triestina di Navigazione (hereinafter called "the Italian company"), of the other part, the company agreed to build and the Italian company agreed to buy a steel motor ship, with engines, boiler, machinery, fittings, outfit, and appurtenances as specified and shown on the specifications and plans signed by and on behalf of both parties thereto. The contract contains, among other things, clauses which, so far as material, are in the following words: Clause 3: "The vessel shall be built under the inspection of such surveyors as the purchasers shall from time to time appoint, but so that there shall not be more than one surveyor at a time over the hull, and one over the engines, boiler, and machinery, and such surveyors shall at all reasonable times during work hours have free access to the vessel during construction. The quality of the material used in the construction of the vessel and the workmanship shall be subject to the approval of the surveyor for classification, and any defective or unsound material or workmanship rejected by him shall be replaced and made good to his satisfaction before delivery of the vessel to the purchasers, but after the vessel shall have been delivered to the purchasers all responsibility on the part of the builders arising under this agreement, except as provided in the specification, shall cease whether such responsibility shall have arisen before or after delivery." Clause 5: "The purchasers shall pay to the builders as the purchase price for the vessel the sum of 133,000*l.* sterling to be paid in manner following, that is to say: on the signing hereof 13,300*l.* When the keel of the vessel is laid 19,950*l.* When the vessel is framed 19,950*l.* When the vessel is plated 19,950*l.* When the vessel is launched 19,950*l.* On delivery and in exchange for builders' certificate 39,900*l.*, 133,000*l.*" Clause 6: "From and after the payment by the purchasers to the builders of the first instalment on account of the purchase price the vessel and all materials and things appropriated for her shall thenceforth, subject to the lien of the builders for unpaid purchase money including extras, become and remain the absolute property of the purchasers." Clause 8: "In the event of any instalment of the purchase price

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remaining unpaid for fourteen days after the same is due the builders shall be entitled to interest thereon at 2*l.* per cent. per annum over the current Bank of England rate and shall be at liberty by notice in writing to be given to the purchasers or sent to them by registered post to rescind this agreement, in which case the purchasers shall thereupon cease to have any interest or property in the vessel, and the same shall become and be the sole property of the builders, free from any claim on the part of the purchasers. . . . ." Clause 9: "The vessel shall immediately after completion make a trial trip (light or loaded at the option of the purchasers) at sea off the coast of Northumberland. The builders shall find the engineers and stokers and provide the necessary bunkers and engine room stores for such trial but the remainder of the officers and crew shall be found by the purchasers whose servants they shall be deemed to be. After a satisfactory trial trip the vessel shall be forthwith delivered to the purchasers in the river Blyth. . . . ." Clause 10: "During the construction of the vessel and until it shall be delivered to the purchasers, the builders shall at their own expense insure the vessel and all materials and things built into the vessel against all fire, launching, harbour and marine risks, before launching for at least the full amount of the instalments paid on account by the purchasers, and after launching for the full value of the vessel from time to time on the basis of the purchase price. Should the purchasers so require, the builders shall also insure the vessel against aircraft, bombardment, and other war risks, and the cost of such last mentioned insurance shall be borne by the purchasers. . . . ." Clause 11: "The vessel shall be delivered to the purchasers in the month of January/February, 1926, in or off the river Blyth, complete according to the specification, and after a satisfactory trial trip at sea. . . . ."

The company proceeded with the construction of the vessel, but on May 15, 1925, an order was made in this action (brought by certain debenture holders, for the purpose of enforcing their security) appointing a receiver and manager of the assets and undertaking of the company, since which date no further work has been done under the agreement. At

the date of the appointment of the receiver, however, the vessel had been partly constructed under the inspection and with the approval of the surveyor for the Italian company, and the first two instalments of the purchase price—namely, the 13,300*l.* payable on the signing of the agreement and the 19,950*l.* payable when the keel of the vessel had been laid—had been duly paid by the Italian company. In addition to the partly completed vessel there had been assembled at the yard of the company worked material which was ready to be, but had not in fact been, incorporated in the hull of the vessel, all of which material had been approved of by the surveyor. There was also lying in the company's yard unworked material intended to be used for the construction of the vessel which, however, had not been approved by the surveyor. In these circumstances this summons was taken out by the plaintiffs in the action in order to have it determined whether (*a*) the partly constructed vessel, (*b*) the worked material intended for the vessel, and (*c*) the unworked material intended for the vessel, are respectively the property of the company or of the Italian company.

The Italian company, though not originally parties to the debenture holders' action, were made parties to the present summons, and ultimately accepted the jurisdiction of the Court to determine the matter on such a summons.

The summons came on for hearing before Romer J. on October 23, 1925.

Maugham K.C. and *Daynes* for the plaintiffs. Neither the unfinished material nor any of the materials not yet set up for the ship have passed to the Italian company by virtue of the Sale of Goods Act. There is only one single contract—namely, for the sale of the complete vessel. It is not accurate to say that there is a separate contract for the sale of the material: see Sale of Goods Act, 1893, ss. 17, 18. If the ship as a whole were attributed to the contract the property would pass, but there is no contract in respect of the skeleton of a ship. The corresponding clause in *Reid* v. *Macbeth & Gray* (1)

(1) [1904] A. C. 223.

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is analogous to and indistinguishable from cl. 6 in the present case: see also *Seath* v. *Moore* (1); *Sir James Laing & Sons* v. *Barclay, Curle & Co.* (2) The case of the skeleton of the ship must be decided in the plaintiffs' favour, because there was no contract for the sale and purchase of the skeleton. There is no decision which suggests that a keel with one or two ribs fastened to it is a ship or vessel within the ordinary meaning of the words "ship" or "vessel." In *Gapp* v. *Bond* (3) the meaning of those words is considered.

Jenkins K.C. and *Rivière* for the Italian company. As to the unworked material forming the subject matter of the third question in the summons, it is not contended that that passes to the Italian company. The worked material, however, passes as being appropriated to the vessel. As to the hull it is settled law that, where, in a shipbuilding contract, a provision for the payment of the purchase money by instalments is found and in the progress of building inspection is allowed to the purchasers, if there is a clause showing the intention of the parties that the property shall become the property of the purchaser, it does become the property of the purchaser: see *Woods* v. *Russell* (4); *Clarke* v. *Spence* (5); *Wood* v. *Bell* (6); and Benjamin on Sale, 6th ed., pp. 405, 406. The decision in *Sir James Laing & Sons* v. *Barclay, Curle & Co.* (7), would have been quite different if there had been a clause of this kind there. In that case inspection and payment by instalments were treated as some evidence of intention to pass an uncompleted vessel. "Appropriated" is a wider term than "being built into" and less wide than "intended."

Daynes in reply. The fact that a trial trip is provided for in the present contract implies that if, after the trial trip, the purchaser says, "This is not the ship which you contracted to build," the hull could not then be taken by the purchaser. The question is whether it was intended by cl. 6 that the property should pass in an artificial way or that the purchaser

(1) 11 App. Cas. 350, 380, 382, 383.
(2) [1908] A. C. 35, 39.
(3) (1887) 19 Q. B. D. 200.
(4) (1822) 5 B. & Al. 942.
(5) (1836) 4 Ad. & E. 448.
(6) (1856) 5 E. & B. 772; 6 E. & B. 355.
(7) [1908] A. C. 35.

should be given a sort of equitable security. As to the appropriated materials, the test is whether the materials have become appropriated to the ship—i.e., whether the builder is compelled to put in the materials or can substitute others. "Appropriated materials" means "materials irrevocably appropriated to the ship."

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Nov. 19. ROMER J. [after stating the facts as above set out, continued:] At the hearing before me it was not seriously contended that the property in the unworked material had passed to the Italian company, but this company does claim that the property in the uncompleted vessel and in the worked material has passed to it. Whether it has or has not is the question that I now have to determine.

The agreement of November 24, 1924, was unquestionably a contract for the sale of future goods within the meaning of the Sale of Goods Act, 1893, this expression being defined by s. 62, sub-s. 1, of the Act as meaning goods to be manufactured or acquired by the seller after the making of the contract of sale. By s. 16 of that Act it is provided that "where there is a contract for the sale of unascertained goods," which expression I understand to mean or include future goods, "no property in the goods is transferred to the buyer unless and until the goods are ascertained." Sect. 18, so far as material, is as follows: "Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer. . . . . Rule 5 (1.): Where there is a contract for the sale of unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made." Goods are in a deliverable state within the meaning of the Act when they are in such a state that the buyer would under the

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contract be bound to take delivery of them: see s. 62, sub-s. 4. In the case therefore of a contract for the sale of a thing to be made, such as a ship, the property in the thing does not pass as a general rule until it has been completed and appropriated to the contract with the assent of both buyer and seller. And this would seem to have been the law before the passing of the Act. But before the Act it was competent to the parties to agree that the thing in its various stages of construction might be appropriated to the contract, and that the property in the thing as it existed from time to time should pass before completion of the whole. I do not understand that in this respect the Act has made any alteration of the law. For s. 18 is expressly qualified by the words: "Unless a different intention appears," and in the case of *Sir James Laing & Sons* v. *Barclay, Curle & Co.* (1), a case relating to a contract for the construction of a ship entered into in the year 1907, Lord Halsbury said: "There is no doubt that a contract might be so framed as to give the purchaser power to claim the property in those parts which, when they are put together, make the complete ship." Sect. 16 is not indeed qualified in any way. But in the cases to which I am referring, I apprehend that the contract is not in strictness merely a contract for the sale of a complete ship. It is in truth a contract for the sale from time to time of a ship in its various stages of construction or of materials to be used in the construction of a ship, the seller, however, being under an obligation of working up the things sold into a complete ship for the purpose of putting them into a deliverable state. It is therefore a contract for the sale of unascertained goods which by appropriation with consent are from time to time ascertained, and there is nothing in s. 16 to prevent the property from thereupon passing. They are not, however, in a deliverable state. Until they are, the property will not, therefore, pass, having regard to the terms of s. 18, unless a different intention appears. Such an intention may be expressed or it may be inferred. Cases in which the intention has been inferred are *Woods* v. *Russell* (2); *Clarke* v.

(1) [1908] A. C. 35, 43.
(2) 5 B. & Al. 942.

Spence (1); and *Wood* v. *Bell*. (2) It is unnecessary for me to consider these cases in detail, because the effect of them has been summarized by Lord Watson in the case of *Seath* v. *Moore*. (3) After referring to the three cases Lord Watson said this: "The English decisions to which I have referred appear to me to establish the principle that, where it appears to be the intention, or in other words the agreement, of the parties to a contract for building a ship, that at a particular stage of its construction, the vessel, so far as then finished, shall be appropriated to the contract of sale, the property of the vessel as soon as it has reached that stage of completion will pass to the purchaser, and subsequent additions made to the chattel thus vested in the purchaser will, accessione, become his property. It also appears to me to be the result of these decisions that such an intention or agreement ought (in the absence of any circumstances pointing to a different conclusion) to be inferred from a provision in the contract to the effect that an instalment of the price shall be paid at a particular stage, coupled with the fact that the instalment has been duly paid, and that until the vessel reached that stage the execution of the work was regularly inspected by the purchaser, or some one on his behalf. I do not think it is indispensable, in order to sustain that inference, that there shall be a stipulation for payment of an instalment in the original contract, or that the stipulated instalment shall have been actually paid. The absence of these considerations, which are, in themselves, of great importance, might, in my opinion, be supplied by other circumstances. At all events, whenever during the currency of a contract which contains no such stipulation, the parties in good faith agree that the purchaser shall pay a sum to account of the price, and that the vessel, so far as constructed at the date of that payment, shall be appropriated to the contract, I see no reason to doubt that the new covenant so made ought to have the same effect as if it had been a term of the original contract. I am, however, of opinion that, by the law of England, in order to

(1) 4 Ad. & E. 448. (2) 5 E. & B. 772; 6 E. & B. 355.
(3) 11 App. Cas. 350, 380, 384.

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pass the property as sold, there must always be facts proved or admitted sufficient to warrant the inference that the purchaser has agreed to accept the corpus so far as completed as in part implement of the contract of sale. There is another principle which appears to me to be deducible from these authorities and to be in itself sound, and that is, that materials provided by the builder and portions of the fabric, whether wholly or partially finished, although intended to be used in the execution of the contract, cannot be regarded as appropriated to the contract, or as 'sold,' unless they have been affixed to or in a reasonable sense made part of the corpus."

Later he said, in further reference to an incomplete corpus, that the property might have passed to the purchaser if at the time when a payment was made under the contract, or at the time when the incomplete corpus was appropriated by mutual consent to the contract, the parties intended and agreed that the contract work so far as then completed and existing in forma specifica should be sold to the purchaser. He then added: "But in order to constitute an agreement to that effect, it must appear that the purchaser consented to accept of the subject in the same condition in which it then was as part of the completed subject which was to be subsequently delivered to him by the seller under the contract of sale." In *Reid* v. *Macbeth & Gray* (1) the question again came up for consideration in the House of Lords. In that case a firm of shipbuilders had contracted to build a ship for a firm of shipowners, to be classed 100 A1 at Lloyd's and to be constructed under the superintendence of the shipowners or of any persons for the time being appointed by them, and the purchase money was to be paid as to one-half in cash on delivery and the balance by the shipowners' six months' acceptances payable in London. But the shipbuilders had the option of drawing on the purchasers during construction as follows: For one-eighth when framed; for one-eighth when plated; and for one-fourth when launched; these acceptances to fall due on delivery of the steamer. Clause 4 of the contract

(1) [1904] A. C. 223, 229, 231, 232.

was in these terms: "The vessel, as she is constructed, and all her engines, boilers, and machinery, and all materials from time to time intended for her or them, whether in the building yard, workshop, river, or elsewhere, shall immediately as the same proceeds become the property of the purchasers, and shall not be within the ownership, control, or disposition of the builders, but the builders shall at all times have a lien thereon for their unpaid purchase money." Clause 5 provided that in the event of the builders making default in prosecution of the construction of the vessel or making default in delivery the shipowners might take possession of the vessel in her then state and of all her engines, boilers, machinery and all materials intended for her or them and to complete the vessel, engines, boilers and machinery. Before the ship was completed the shipbuilders became bankrupt, and at the date of their bankruptcy there were lying at railway stations a quantity of iron and steel plates at the orders of the shipbuilders. These plates were claimed by the shipowners. The plates had been passed by Lloyd's surveyor at the makers' works, and they were each numbered by the makers with the number of the vessel and with marks showing the position which each plate was to occupy in the vessel. There was, however, no evidence that they had been inspected by the shipowners or on their behalf for the purpose of passing them as work under the contract. It was held by the House of Lords that the property in the iron and steel plates had not passed to the shipowners. Lord Halsbury stated that in the contract there was no sale at all except the sale of a complete ship, and that clauses 4 and 5 of the contract lacked every element of sale of the materials in question. He added: "My own view of those sections is that they were intended by the parties to form a security—I dare say it was an ineffectual attempt by the parties to form a security; but that which is sold is a complete ship." He then dealt with the suggestions that had been made on the part of the shipowners that the inspection by Lloyd's of the materials was an acceptance by the shipowners of those particular things which were to form portions of the ship when sold, stating that there was

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nothing in the relations of the parties which suggested the agency of Lloyd's as taking the place of the person who was to act on behalf of the purchaser. He stated that that of itself would be sufficient to dispose of the case, but that the matter was really concluded by authority, because their Lordships' House had had before it, in the case of *Seath* v. *Moore* (1), a contract which it would be in vain to distinguish from the present case, and held that what Lord Watson had said in the case of *Seath* v. *Moore* (1) covered the case then before the House. He then quoted from the passage in Lord Watson's speech in *Seath* v. *Moore* (1) the words cited above: "There is another principle which appears to me to be deducible from these authorities and to be in itself sound, and that is, that materials provided by the builder and portions of the fabric, whether wholly or partially finished, although intended to be used in the execution of the contract, cannot be regarded as appropriated to the contract or as 'sold' unless they have been affixed to or in a reasonable sense made part of the corpus." Lord Davey, in reference to the expression in cl. 4 of the contract, "as the same proceeds," said this: "I think 'the same' must mean either as the ship proceeds or as the construction of the ship proceeds; but whether you put the one or the other of those meanings upon the words, it is clear, whatever else may be obscure in this fourth clause, that the goods in question are only to become the property of the purchaser from time to time as progress is made in the construction of the ship. From that I should certainly understand, as I think was the view of the Lord Ordinary, that according to the true construction of the clause it was only when the chattels in question were applied for the use of the ship, and became part of the structure of the ship, that it was intended that those words vesting the property should operate." He added that, supposing that construction were not correct, he entirely agreed with what Lord Halsbury had said as to the decision in *Seath* v. *Moore* (1), and, after stating that the fact that at the time of that decision the Sale of Goods Act, 1893, had not been passed, said

(1) 11 App. Cas. 350, 381.

that he was unable to see that that was any solid ground for distinguishing the cases. Then, after referring to ss. 16 and 18 of that Act, he added that they had no application whatever to the case then before the House, for the simple reason that there there was no contract for the purchase of the materials, and added: "The learned counsel and also the learned judges in the Court below seem to me to have proceeded on the supposition or hypothesis that this contract contained, not only a contract for the purchase of the ship, but a separate contract for the purchase of the materials also; and that seems to me to be a complete fallacy. There is only one contract—a contract for the purchase of the ship. There is no contract for the sale or purchase of these materials separatim; and unless you can find a contract for the sale of these chattels within the meaning of the Sale of Goods Act, it appears to me that the sections of that Act have no application whatever to the case."

No question appears to have been raised in *Reid* v. *Macbeth & Gray* (1) as to the property in the uncompleted ship. But I do not think that any of the learned Lords who took part in the decision intended to indicate an opinion that assuming that the construction of the ship, so far as it had gone, had been carried out under the superintendence of the shipowners, and assuming that cl. 4 of the contract received the limited construction which Lord Davey thought should be placed upon it, the property in the uncompleted ship would not have passed to the shipowners. A somewhat similar question once more came before the House of Lords in the case already referred to of *Sir James Laing & Sons* v. *Barclay, Curle & Co.* (2) The headnote to the report of that case is as follows: "Where it appears to be the intention of the parties to a contract for the building of a ship that the vessel is not to be delivered and finally accepted until after an official trial off a foreign coast, and until after conditions of the contract have been fulfilled as to speed, consumption of coal, capacity etc., the property in the ship does not pass to the purchaser while the vessel remains uncompleted, although the contract

(1) [1904] A. C. 223. (2) [1908] A. C. 35, 43, 44.

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contains stipulations for the price to be paid by instalments at certain periods of construction. The respondents, a Glasgow firm of shipbuilders, agreed to build two ships for an Italian firm, according to certain specifications and under the superintendence of an agent appointed by the Italian firm, for a certain amount payable by instalments at specified stages of construction; but delivery of the ships was not to be considered to be completed till they had passed trials at Greenock and off the Italian coast. Before the ships were fully constructed, but after several instalments had been paid, the appellants, an English firm of shipbuilders, arrested the ships in Scotland for a debt alleged to be due to them by the Italian company, but on a petition to the First Division of the Court of Session the arrestments were recalled: Held (affirming the decision of the First Division), that no intention was shown in the contract to make delivery of or to pass the property in the ships before they were completed, and that the arrestments were properly recalled." Lord Loreburn in his speech to the House said: "The facts . . . . that the ship was to be paid for by instalments, and that there was a power of inspection on the part of the purchasers, may be marks pointing to the property passing, but it is not conclusive, and the question still remains as to what the contract really means. I think the contract was for a completed ship, and the risk lay upon the builders until delivery, and there was no intention to make delivery or to part with the property until the vessel was completed." Lord Robertson said: "The question in the present appeal seems to me to be governed by the Sale of Goods Act, and, by that statute, to be determinable by the intention of the instrument under which the ship is built. In aid and supplement of construction, the statute supplies certain rules; but these may or may not come in operation, according as the contract requires it. In the present case I find the contract to require no aid or supplement from the statutory rules, for it seems to me to provide from beginning to completion of this ship by the shipbuilders with their materials, and transfers it to the purchasers only as a finished ship and at a stage not in fact yet reached. This is

a simple view of the matter; but in my judgment it is the sound one. It treats the Sale of Goods Act as superseding the previous law; and if in some instance it may be found necessary to revive and reconstruct the old common law for purposes of illustration, I can only say that that occasion has not yet come." In many respects the contract which the House of Lords had to consider in the case last cited closely resembles that with which I have to deal, and, were it not for clauses 6 and 8 of the present contract, would practically be indistinguishable. It becomes, therefore, necessary to ascertain what is the true construction and effect of those clauses. Are they clauses which, like clauses 4 and 5 in the contract in *Reid* v. *Macbeth & Gray* (1), were merely intended by the parties to form a security, or are they clauses which indicate the intention of the parties that the property should pass? In my opinion, according to their true construction, they do indicate an intention that the property in the uncompleted vessel should pass. That would appear to be the natural meaning of the words used, and there is nothing in the earlier part of the agreement to indicate that the words were not intended by the parties to bear their natural meaning. On the contrary. The fact that the ship was to be paid for by instalments and was constructed under the inspection of the purchasers (though such facts are not conclusive in themselves) strongly point to the conclusion that the property in the uncompleted vessel was intended to pass. I say advisedly "the property in the uncompleted vessel" because, in my opinion, cl. 6 does not, according to its true construction, deal with the property in materials not affixed to, and so made part of, the vessel, even though such materials had been inspected by and approved of by the surveyor of the Italian company.

I am led to this conclusion by the following considerations. Although such materials and things may have been passed by the surveyor, it was necessary, before they could be considered as finally appropriated to the vessel, that they should be fixed to the vessel in a manner approved of by the surveyor, and, until this had been done, I cannot think that the materials

(1) [1904] A. C. 223.

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and things were appropriated for the vessel within the meaning of cl. 6. Confirmation of this view is to be found, I think, in clauses 8 and 10. Under the former clause, in the event of default in payment of any instalment, the company could by notice in writing rescind the agreement, and thereupon the clause provides that the Italian company should cease to have any interest or property in the vessel, no reference being made to materials and things. The object of cl. 8 would appear to be, in the event mentioned, to revest in the company the property which had become vested in the Italian company under the provisions of cl. 6. If this be so, it would appear that the word "vessel" in cl. 8 was treated as being wide enough to include materials and things appropriated for her within the meaning of cl. 6, and this could not well be the case unless the materials and things had been so appropriated as to form part of the uncompleted vessel. By cl. 10 it is provided that during the construction of the vessel, and until it shall be delivered to the Italian company, the company should at their own expense insure the vessel and all materials and things built into the vessel. Here again it seems to me that the object of the clause was to compel insurance of everything the property in which had passed to the Italian company, and if this be so it is another indication that by the phrase "materials and things appropriated for her" used in cl. 6 the parties meant materials and things built into the vessel.

I therefore come to the conclusion that the property in the uncompleted vessel has passed to the Italian company, and the reasoning that has led me to this conclusion also leads me to the conclusion that the property in the materials not actually built into the vessel has not so passed. For, until these materials were so built into the vessel, they were not to be paid for by the Italian company, and the only fact in any way tending to show that the parties intended the property in them to pass is the fact that they were inspected and passed by the surveyor of the Italian company. This circumstance, however, can have no weight in view of the fact that, according to the construction which I have put upon the contract, the parties have expressly agreed that

the property in the uncompleted vessel should pass to the Italian company, but have made no express provision as to the passing of the property in the loose materials.

J. L. D.

The Italian company appealed from so much of the decision as related (*a*) to the worked material intended for the vessel, and (*b*) to the unworked material intended for the vessel.

The appeal was heard on January 27, 1926.

Jenkins K.C. and *Rivière* for the appellants. The result of Romer J.'s decision is that these appellants are entitled to the hull of the uncompleted vessel but not to the worked and unworked materials. We do not press the appeal in respect of the unworked materials, but we contend that the property in the worked material intended for the vessel passed to the appellants. The question turns upon the meaning of "appropriated" in cl. 6 of the contract. The language of that clause has a wider application than to include only material that has been actually made part of what we had contracted to buy. The word "vessel" used alone in cl. 8 would necessarily include all materials built into and forming part of the vessel, and in cl. 10 the word is so expanded, but when those two clauses are contrasted with cl. 6, the words "and all materials and things appropriated for her" when used in addition to the word "vessel" must mean something more than the materials built into the actual hull, without which there would be nothing which could be called a vessel. "Appropriated" points to an earlier stage than that of being built in. A mere intention to use the materials on the ship would not be enough, but all material had to be approved by the surveyor appointed by the purchasers, and provision of the materials by the builders followed by the approval of the surveyor amounts to an agreement by the builders to use those approved materials in the construction of the ship, and constitutes an "appropriation" within the meaning of cl. 6.

Moreover, the instalments of the purchase price were payable in advance. The first payment of 13,300*l.* was not

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merely for the keel, and the second instalment of 19,950*l.* was payable when the keel was laid. On those payments there was nothing answering the description of a "vessel," in which the property would have passed to the purchasers, but there were materials approved and appropriated for the proposed vessel, the property in which would have passed to them. The contract therefore contemplated that before the vessel took shape as such, the property in some of the materials appropriated for her would pass.

In *Woods* v. *Russell* (1) the property in the rudder and cordage intended specifically for the ship was held to pass to the purchaser. In both *Tripp* v. *Armitage* (2) and *Wood* v. *Bell* (3) the contracts contained no such special words or clauses as appear in this contract.

Daynes (*Maugham K.C.* with him), for the respondents, was not called upon.

POLLOCK M.R. This is an appeal from a portion of the judgment of Romer J., who, on the hearing of the summons, decided that the receiver and manager had no right to retain the partly constructed hull, but that he could retain (1.) the worked material intended for the vessel, and (2.) the unworked material intended for the vessel. From the latter portion of that decision the Italian company has appealed, and the main question which has been argued before us is whether or not the receiver is entitled to retain the worked material intended for such ship. There is no appeal on the other point.

The question has to be determined by an examination of the terms of the contract of November, 1924. It follows a very unusual form, and cl. 5 provides that the purchasers, the Italian company, are to pay the builders the purchase price for the vessel, amounting altogether to 133,000*l.*, in the manner specified in that clause; that is to say: on the signing of the contract, 13,300*l.*; when the keel of the vessel is laid, 19,950*l.*; when the vessel is framed, 19,950*l.*, and

(1) 5 B. & Al. 942. (2) (1839) 4 M. & W. 687.
(3) 6 E. & B. 355.

other like sums when the vessel is plated and when the vessel is launched. It appears, therefore, that in the three cases to which I have referred—namely, when the vessel was framed, plated and launched, although the vessel is in building, it is described as a vessel.

We then come to cl. 6, which is the crucial clause, and that provides as follows. [His Lordship read the clause and continued:] It appears that at the time when the receiver for the debenture holders came upon the scene and at the time when his title accrued there was worked material worth 7660*l.*, which had been approved by the Italian company's surveyor, and a certain amount of unworked material worth 1160*l.*, which had not been approved. The contest arises in respect of this worked material to the value of 7660*l.* Is that worked material part of the "materials and things appropriated for" the vessel which are to "become and remain the absolute property of the purchasers" by virtue of the contract made between the builders of the vessel and the purchasers of the vessel and contained in cl. 6? I do not think that much help is to be gained from the other clauses of the contract. It is perhaps, however, well to call attention to the fact that cl. 10 of the contract provides for the insurance in these words: "During the construction of the vessel and until it shall be delivered to the purchasers, the builders shall at their own expense insure the vessel and all material and things built into the vessel against all fire, launching, harbour and marine risks." It is pointed out that when the question of insurance is dealt with the parties are not content with using the term "vessel," but they add as well "all materials and things built into the vessel," and one would have supposed that the subsequent words were unnecessary, because you would have thought that the word "vessel" would have covered all materials and things which were attached to it at the time. Although, therefore, it may be that a contrast is observable in cl. 10, and that it is difficult to treat cl. 6 when it refers to a vessel as meaning all materials which are attached to it, yet I doubt very much whether there is sufficient reason for treating the one clause

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as explained by the other, or the one as being an interpretation clause to be applied to the other.

Speaking for myself, if these words were absolutely free from and unfettered by any decision, I think that it would be attractive to say that these words, " all materials and things appropriated for her," were intended to mean and cover materials and things which had been brought to the slip for the purpose of being put upon that particular vessel, or had been shaped or numbered, or in some way made of the appropriate size, for the purpose of being used in the progress of the completion of the vessel. On the other hand, one has to remember that this cl. 6 is a very important clause, and must be carefully construed, because the effect of it ex facie is to take away certain materials and things which up to that time are owned by and the property of the building company and hand them over to the owner of the vessel, an operation which may have considerable effect upon the position and credit of the building company. For a good number of other reasons I think it is clear that one must be cautious in the interpretation put upon the word " appropriated." It can be quite easily seen that a loose construction might enure to the benefit of a particular purchaser, but be a very serious matter for the building company. More than that, the words " appropriated for " may be used in respect of goods which have been passed by the surveyor of the Italian company, to whom is entrusted the duty of watching the progress of the vessel, or it may mean the goods which have been appropriated but not passed by the surveyor, or it may mean goods which have been built specially for and only to that design, or the plates which are to be used upon the work of this particular ship. I am clear, therefore, that although it might appear easy to construe the word " appropriated," one has to be very careful to follow the cases which have already been decided, and which must or ought to have been in the mind of the draftsman of this clause. It is clear that a clause of this nature is no uncommon one in the matter of building ships or building houses, and a table of the cases which have been decided on this point,

cases showing where the property in unfixed materials has not passed, is to be found usefully set out in Mr. Hudson's book on Building Contracts.

The learned judge has come to the conclusion that this worked material which has been approved by the surveyor to the value of 7660*l.* is not within the words "material and things appropriated for the vessel." In a very careful judgment he has examined the cases. At the outset of his judgment he deals with the appropriate sections of the Sale of Goods Act, 1893. I do not desire to go over the same ground again, but it is pointed out that in r. 5 (1.) to s. 18, for the purpose of ascertaining when the property passes, the goods must be "unconditionally appropriated to the contract." If any test is to be derived from the Sale of Goods Act I do not think that that word "unconditionally" ought to be overlooked. What is meant by "appropriated" in this sort of connection? Does it mean that once some goods have been appropriated and brought on to the site definitely to be used in the vessel, no others can be substituted for them; that if those particular goods were damaged or injured or found for some other reason unsuitable, no change could be made except at increased cost to the purchaser of the vessel? Does it mean that those goods and those only are the goods which are to be used and in respect of which, if any misfortune happens, it falls upon the shoulders of the purchaser? Unless such is found to be the case it does not appear that it would be right to say that the materials and things had been unconditionally appropriated. More than that, it would appear from an examination of the Sale of Goods Act that there must be an assent to the appropriation; the appropriation offered by the builder must be assented to for or on behalf of the purchaser of the vessel. However, it appears to me that you cannot accept the passing of these materials and things by the surveyor appointed by the purchaser of the vessel as being an acceptance of the appropriation for the purposes of this contract. To go back to *Tripp* v. *Armitage* (1), a case decided in 1839, but which

(1) 4 M. & W. 687, 698.

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has been approved in recent years, Lord Abinger deals with this very argument. With regard to the argument of counsel he says: "I cannot at all adopt the first ground he has taken; namely, that by reason of the approbation of Turnbull, the clerk of the works, and the application of the pulleys sent by the defendants to be fixed to the sashes, the property was appropriated to the defendants," and he gives his reasons, which are too long for me to set out, but he points out the difficulties to which I have referred. If the appropriation is to be held to have been complete, then the purchaser is placed in the unfortunate position of having to replace the goods if they are lost before they have actually been fixed into the vessel.

Wood v. *Bell* (1) was to the same effect. There the same question arose whether or not the plaintiff was to recover as against the assignees in bankruptcy of the builder in respect of the ship and loose things, engines and materials. Jervis C.J., in giving the judgment of a very strong Court, says this, in speaking of these materials: "Here they are merely provided for the ship. If the circumstances in *Woods* v. *Russell* (2) were the same as here, I should doubt whether the decision in that case was right, and I should say the same as to *Goss* v. *Quinton*. (3) The question is, What is the ship? not, What is meant for the ship? I think those things pass which have been fitted to the ship, and have once formed part of her, as, for instance, a door hung upon hinges, although afterwards removed for convenience. I do not think the circumstance that materials have been fitted and intended for the ship makes them part of the ship." It is clear, therefore, upon those authorities that mere acceptance by a surveyor or fitment to a particular design appropriated to the ship are not sufficient to appropriate them for the purpose of making them the property of the purchasers.

Lastly in *Seath* v. *Moore* (4), to which the learned judge below referred, Lord Blackburn says this: "It is, I think,

(1) 6 E. & B. 355, 362.
(2) 5 B. & Al. 942.
(3) (1842) 3 Man. & G. 825.
(4) 11 App. Cas. 350, 370.

a question of the construction of the contract in each case, at what stage the property shall pass; and a question of fact, in each case whether that stage has been reached." Then Lord Watson says (1): "It appears to me to be impossible to hold that any of these articles were specially appropriated to the several contracts for which they were provided, or, in other words, that they were 'sold' in such sense as to give the appellants a jus ad rem, unless your Lordships shall be of opinion that the decisions of the Court of Exchequer in *Tripp* v. *Armitage* (2), and of the Exchequer Chamber in *Wood* v. *Bell* (3), are contrary to law."

With these authorities before me I feel that I am guided to give a construction to these words far narrower than at first sight I should myself have given. It seems to me that the materials and things must be appropriated in a much closer and more complete sense than by mere acceptance by the surveyor or by having been made in such a manner as that they could be fitted upon the vessel. I come ultimately to the conclusion after examining the cases that the words in question mean materials which have been fitted into the vessel, or if they have not been completely fixed upon the vessel are substantially in situ, so that the removal of them would involve a going back upon the work to be done upon the vessel. It seems to me that we are to read the word "appropriated" in that sense. I have therefore come to the conclusion that these worked materials, although worked up and suitable for placing into the vessel at the appropriate time, and accepted, it may be, by the surveyor, have not yet taken their place and become so inextricably a part of the vessel as to have satisfied the meaning of the word "appropriated."

For these reasons I think that the learned judge was right, and that the appeal must be dismissed with costs.

WARRINGTON L.J. I am of the same opinion. We have to determine a point arising on the construction of a contract

(1) 11 App. Cas. 382. (2) 4 M. & W. 687.
(3) 6 E. & B. 355.

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for the building of a ship, and the point we have to determine is this: whether certain material that was worked and lying in the yard or the building berth ready to be incorporated in the hull of the vessel and which had been approved by the purchasing company's surveyor became thereby the property of the purchasers. The question turns directly upon a clause in the contract. The contract provided for the building of a ship, for the inspection of the ship during its building, and of its materials by a surveyor appointed by the purchasers, and for the payment by instalments of the purchase money. One instalment was to be paid on the signing of the contract, that is to say, before any work had been done at all, the next when the keel of the vessel was laid, and others at certain stages of its construction. Then the contract contains the clause in question. [His Lordship read cl. 6 of the contract and continued:] It is important to notice that the effect of that clause, whatever may be the incident of its subject matter, is to make that subject matter the property of the purchasers. The contract is for the sale not of detached chattels which these worked materials not yet added to the ship are, but it is a contract for the sale of a particular chattel, which is the ship. I think that the result of the argument in this case has been to convince me that the word "appropriated" is used in this contract to express really what would have been inferred to be the intention of the parties if we had had nothing but the contract for the building of the ship and the payment of certain instalments as the building progressed. That the result of that state of things would have been to vest the vessel at its various stages of construction with, of course, the materials which at that stage formed part of it, I think is quite plain from a passage in the speech of Lord Watson addressing the House of Lords in *Seath* v. *Moore*. (1) I need not read the whole of that passage. It expresses what would have been the result, but he then adds (2) the passage which in my judgment determines the present case: "There is another principle which appears to me to be deducible from these authorities and to be in

(1) 11 App. Cas. 350, 380, 381. (2) Ibid. 381.

itself sound, and that is, that materials provided by the builder and portions of the fabric, whether wholly or partially finished, although intended to be used in the execution of the contract, cannot be regarded as appropriated to the contract, or as 'sold,' unless they have been affixed to or in a reasonable sense made part of the corpus. That appears to me to have been matter of direct decision by the Court of Exchequer Chamber in *Wood* v. *Bell*. (1) In *Woods* v. *Russell* (2) the property of a rudder and some cordage which the builder had bought for the ship was held to have passed in property to the purchaser as an accessory of the vessel; but that decision was questioned by Lord Chief Justice Jervis, delivering the judgment of the Court in *Wood* v. *Bell* (1), who stated the real question to be 'what is the ship, not what is meant for the ship,' and that only the things can pass with the ship 'which have been fitted to the ship and have once formed part of her, although afterwards removed for convenience.'" If that is true, then these things which have only been prepared by the builders, approved so far as quality is concerned by the purchasers' surveyor, and no doubt intended by the builders to be used in the construction of the ship, cannot be said to be appropriated. If any other construction were put upon the contract the result would be startling, because if these goods from the moment they were intended by the builder, brought into the yard and approved of by the surveyor, as materials to be used in the construction of the ship belonged to the owner of the ship, that is to say, the purchaser, and were his property, they would be entirely at his risk; if anything happened to them before they were built into the ship he would have to pay for the substitution of other materials. It seems to me impossible to suppose that the parties really intended any such consequence as that. I think, therefore, that the real way of dealing with this question is to read the word "appropriated" in its proper technical sense and as limited to goods which have been so dealt with that the builder could not use them except for the purposes of the ship, and that the

(1) 6 E. & B. 355. (2) 5 B. & Al. 942.

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purchasers could not refuse to accept them as part of the ship, but that the mere intention on the part of the builder to use them is not enough to transfer the property to the purchasers.

In my opinion the judgment of Romer J. is correct, and the appeal ought to be dismissed.

SARGANT L.J. I am of the same opinion. The question here really turns upon the meaning of the word "appropriated" in cl. 6, and it seems to me that "appropriated" is a term of legal art and has a certain definite meaning. I do not think that a material is appropriated for the purpose of passing property, by any intention, however definite, on the part of one of the parties to the contract, or by any process of approval of the quality of the material by the surveyor of another party. For appropriation I think there must be some definite act, such as the affixing of the property to the vessel itself, or some definite agreement between the parties which amounts to an assent to the property in the materials passing from the builders to the purchasers.

In addition to the cases which have been referred to in the judgments already delivered, I should like to refer to one of *Wait* v. *Baker*. (1) There, there was a contract for the sale of from 400 to 500 quarters of barley which were to be shipped at Kingsbridge and delivered at Bristol, and the vendor kept the purchaser informed of the chartering of the vessel, and of the loading of the proper number of quarters of corn on board the vessel, and in one letter he says: "I now send you copy of charterparty of the *Emerald*, which vessel will sail for the port of loading to-day or to-morrow." Then he says: "The *Emerald* will commence loading to-day," and again he says: "I hope to be able to send you invoice and bill of lading of *Emerald*." Then he wrote: "The *Emerald* is nearly loaded; expect the bill of lading to-day or to-morrow. I expect to be in Exeter on Friday, when it is very likely I shall run down and see you." Then two days afterwards the vendor, Lethbridge, called on the

(1) (1848) 2 Ex. 1, 3, 4.

defendant at Bristol and left the invoice and unindorsed bill of lading at his counting-house. "At a subsequent part of the day, Lethbridge called again upon the defendant, when the defendant raised some objections to the quality of the cargo, and asserted that it was inferior to the samples: he also threatened he would take the cargo, but sue Lethbridge for eight shillings a quarter difference. After some further dispute upon the matter, the defendant offered Lethbridge the amount of the cargo in money, and said that he accepted the cargo." Lethbridge declined, sold the cargo to another purchaser, and it was held that the other purchaser acquired a good title. Every step was taken towards an appropriation short of the final step of the definite assent between the two persons, the vendor and the purchaser, as to those particular quarters of wheat being the quarters of wheat which had been agreed to be sold.

Here to my mind the mere fact that the shipbuilders brought appropriate materials on to their yard and had them fashioned and fitted ready to be affixed to the vessel, was not appropriation in the legal sense, and that although the quality had been approved of by the surveyor of the shipowner. It seems to me that if the shipbuilders had had a similar vessel being built in an adjoining slip, and had desired for certain reasons of urgency to apply the materials they had collected for the ship now in question to the other vessel, they would have been entitled to do so, and that the property would not have passed from them so as to prevent their applying these materials for that purpose.

I was oppressed at one time by the fact that in cl. 6 there is the use of the words: "The vessel and all materials and things appropriated for her." I thought that the vessel prima facie would mean the vessel in its various stages of construction, and that if in order to pass the property in these materials it was necessary to have the materials affixed those words, "all materials and things appropriated for her," might be taken as superfluous, but I think there are two answers to that. In the first place I think that the words would include materials or things which, although not actually

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fixed, had by the common consent of the builders and the owners been agreed to be affixed to the vessel; and, in the second place, it seems to me that the word "vessel" here is used in a loose way and does not necessarily comprehend the whole structure of the vessel in every detail as it is being completed. Rather it looks to me as if the vessel here means the general structure of the vessel, and the words "all materials and things appropriated for her" may very well apply to all sorts of fittings and matters of that kind which do not really constitute the general structure of the vessel. That appears to me to be borne out very much by the clause as to insurance, where it is provided that the builders shall at their own expense insure the vessel and all materials and things built into the vessel. It is clear there, at any rate, that the word "vessel" is looked on as comprising something short of everything which is affixed to the structure of the vessel, and is used in an even narrower sense than it appears to be used in cl. 6.

On the whole I have come to the conclusion, though the agreement is not an easy one to construe logically throughout, that the decision of the learned judge was right, and that there was not here sufficient to pass to the shipowners the property in the materials in question.

Solicitors for appellants: *Maples, Teesdale & Co., for Bramwell, Clayton & Clayton, Newcastle-upon-Tyne.*

Solicitors for respondents: *Field, Roscoe & Co., for Wilkinson & Marshall, Newcastle-upon-Tyne.*

R. M.

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[1925. G. 766.]

Conveyance—Right of Way—Right claimed referred to in the Habendum but not in the Parcels—Privilege enjoyed with the Land conveyed—Contrary Intention—Conveyancing Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 6, *sub-ss.* 2, 4.

In the conveyance to the plaintiff of a house and land there was an express grant to her of a way described as coloured green on the plan indorsed on the deed. The part coloured green was four feet wide, and formed part of a wider roadway running along the back of the adjoining houses to the back premises of the plaintiff's house. At the time of the conveyance a right of access for vehicles to the plaintiff's back premises over the whole roadway was enjoyed with the house conveyed. The habendum in the conveyance was "to hold the same with the benefit of all such easements and privileges in the nature of easements as are now subsisting in respect of the property hereby conveyed." The plaintiff claimed that the right to use the whole width of the roadway for the purpose of access of vehicles to her back premises passed to her under her conveyance:—

Held, that the right claimed passed to the plaintiff by virtue of s. 6, sub-s. 2, of the Conveyancing Act, 1881, there being no unequivocal "contrary intention" expressed in the deed within the meaning of s. 6, sub-s. 4, of the Act, sufficient to negative the passing of such right.

Decision of Russell J., ante, p. 102, reversed.

Appeal from a decision of Russell J. (1)

The defendant Richards was the owner of a rectangular piece of ground on part of which were five houses fronting on to Gower Street, Willenhall, Stafford, and numbered 12 to 16, inclusive. Gower Street ran north and south, and No. 16 was at the northern end. The grounds of No. 16 ran back for the full depth of the rectangle—namely, 120 feet—but the grounds of Nos. 12 to 15 ran back only 69 feet. At the back of Nos. 12 to 15, and partly at the side of No. 12, there was a yard, belonging at the time of the conveyance to the defendant Richards, access to which for vehicles from Gower Street was through double gates measuring 14 feet wide on the south side of No. 12. There was no defined road, the land being old garden ground. Beside the double gates was a gateway for foot passengers. For a number of years before the date of the conveyance to the plaintiff the

(1) Ante, p. 102.

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occupiers of Nos. 12 to 16 had enjoyed a privilege, or quasi-easement, in the shape of access by vehicles to the rear of their premises through the double gates over the way leading into the yard. There were double gates, as well as a single gate, in the paling of the back area or garden of No. 16 opening on to the road or way, and refuse had been removed and coals brought in through these gates to and from carts which had used the road or way as a means of access.

On May 4, 1923, the defendant Richards conveyed to the plaintiff in fee simple No. 16 Gower Street, "together with the right for the owners and occupiers for the time being of the property hereby conveyed to use jointly with all other persons for the time being entitled to use the same the road or way at the back of the buildings Nos. 12 to 15 Gower Street aforesaid and the way or passage leading into Gower Street and coloured green on the said plan indorsed on these presents such owners or occupiers paying a proportionate part of the expense of keeping the said way or passage in repair . . . . to hold the same subject to and with the benefit of all such easements and privileges in the nature of easements as are now subsisting in respect of the property hereby conveyed and the said adjoining property of the vendor." The way coloured green on the plan indicated only a way four feet wide leading from the footway entrance in Gower Street, through the yard for 69 feet, then turning at right angles and running at the back of Nos. 12 to 15, and terminating at the side of No. 16, to which there was access by means of the double and single gates above mentioned. On March 20, 1924, the defendant Richards sold to the defendants, A. E. Jenks & Cattel, Ld., Nos. 12 to 15, the yard at the back, and the way leading to the yard from Gower Street. The defendants contended that the plaintiff had only a right of access to the back of No. 16 over the footway coloured green and four feet wide, and erected a fence to prevent access for vehicles from Gower Street. The plaintiff claimed that on the true construction of her conveyance she, as owner of No. 16, had a right of way for vehicles from Gower Street to the back of her premises, and

asked for: (1.) a declaration accordingly; (2.) alternatively, rectification of the said indenture.

Russell J. decided that the right claimed did not pass under sub-s. 2 of s. 6 of the Conveyancing Act, 1881, because there was a "contrary intention" expressed in the conveyance within the meaning of sub-s. 4 of s. 6.

The plaintiff appealed.

The appeal was heard on January 19 and 20, 1926.

G. B. Hurst K.C. and *Bischoff* for the appellant. The right of way claimed by the appellant over the road passed to her under the conveyance by virtue of the general words implied by s. 6, sub-s. 2, of the Conveyancing Act, 1881. Before that Act a similar right of way was held to pass by way of implied grant: *Brown* v. *Alabaster* (1), and after the Act, even a way enjoyed only by permission, was held to be covered by s. 6, sub-s. 2: *International Tea Stores Co.* v. *Hobbs.* (2)

The words of s. 6, sub-s. 2, must be taken to be written into the deed unless they are expressly excluded, or are so inconsistent with the other contents of the deed as not to be capable of being written in. The grant of a four feet right of way is not so inconsistent as to exclude the larger right of way or to amount to the expression of a contrary intention within s. 6, sub-s. 4: *Broomfield* v. *Williams* (3); *Hansford* v. *Jago* (4), the effect of which latter decision may be summed up as—"the fact that the conveyance expressly grants some right which would pass without express mention is not sufficient to show a contrary intention": Wolstenholme and Cherry's Conveyancing Statutes, 11th ed., p. 233. With reference to the maxims "Expressum facit cessare tacitum" and "Expressio unius exclusio alterius," Farwell L.J. said in *Lowe* v. *Dorling & Son* (5): "It is not enough that the express and the tacit are merely incongruous; it must be clear that they cannot reasonably be intended to co-exist." That

(1) (1887) 37 Ch. D. 490.
(2) [1903] 2 Ch. 165.
(3) [1897] 1 Ch. 602.
(4) [1921] 1 Ch. 322.
(5) [1906] 2 K. B. 772, 785.

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applies in this case; the test question is whether this footway can co-exist with the right of road claimed by the appellant, and there is nothing to show that it cannot.

The habendum does not show any necessary expression of a contrary intention, because if the thing newly added in the habendum "be implied in the thing granted by the premises of the deed, as being an incident or appendant thereunto, or otherwise, ... in these cases the premises and the habendum may stand together": Preston's Sheppard's Touchstone, 7th ed., p. 76. The application of s. 6, sub-s. 2, is not excluded by the mention of the four feet way.

Bennett K.C. and *W. F. Waite* for the respondents, A. E. Jenks & Cattel, Ld. The incorporation of s. 6, sub-s. 2, is subject to the provisions of sub-s. 4. The evidence of user was that the user was limited to the purpose of removing dust and bringing coal; that would not extend to a right of way for all purposes, as claimed by the appellant. There was no such defined roadway here as has in other cases been held to be necessary for the enjoyment of the right. In order to pass under general words there must be a right over a defined path or road: *Thomson* v. *Waterlow* (1); per Bramwell B. in *Langley* v. *Hammond* (2); *Watts* v. *Kelson*. (3) The user in this case was a mere convenience to the appellant's house; it was not an apparent necessity for this roadway to be used as claimed, and that distinguishes it from *Kay* v. *Oxley* (4), where the way was a necessity. This is not such a right of way as would be passed by the language of s. 6, sub-s. 2; it is not a way appertaining or reputed to appertain to, or occupied or enjoyed with the house.

The right of way claimed is over the very soil over which the express grant operates; the latter is over four feet of the roadway. The latter right of footway is wholly inconsistent with a larger right of roadway, and the words which would be incorporated by s. 6, sub-s. 2, would give a right "to an extent inconsistent with the intention to be implied from the circumstances existing at the time of the grant and known

(1) (1868) L. R. 6 Eq. 36.
(2) (1868) L. R. 3 Ex. 161, 171.
(3) (1871) L. R. 6 Ch. 166, 174.
(4) (1875) L. R. 10 Q. B. 360.

to the grantee" : per Joyce J. in *Godwin* v. *Schweppes, Ld.* (1) The parties to this conveyance knew all the circumstances, and yet only a four feet right of way was granted, and in face of that a right of a different nature cannot pass. The express grant negatived any larger grant and is a contrary intention within sub-s. 4. The circumstances existing at the date of the grant and known to both parties cannot be disregarded : *Birmingham, Dudley and District Banking Co.* v. *Ross.* (2) The limited grant was made in this deed so as to exclude any idea of a larger grant.

Roope Reeve K.C. and *Hodge* for the respondent Richards took no part in the argument.

POLLOCK M.R. [stated the facts, and that Russell J. had found on the evidence that at the date of the conveyance to the plaintiff there was a privilege or right enjoyed with No. 16 for horses, carts and carriages to get to the double gates at the back of No. 16 by means of access through the double gates in Gower Street and along the road or way at the back of Nos. 12 to 15 Gower Street ; and his Lordship continued :] What is the effect of Russell J.'s finding ? We have to bear in mind that s. 6, sub-s. 2, of the Conveyancing Act, 1881, provides that "A conveyance of land, having houses or other buildings thereon, shall be deemed to include and shall by virtue of this Act operate to convey, with the land, houses, or other buildings, all outhouses, erections, fixtures, ... privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, houses, or other buildings conveyed, or any of them, or any part thereof, or at the time of conveyance demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to, the land, houses, or other buildings conveyed, or any of them, or any part thereof." Russell J. says : "In view of the finding of fact in the plaintiff's favour as to the privilege which was enjoyed at the date of the conveyance to her I think she comes within the terms of sub-s. 2," and it is to be observed that the

(1) [1902] 1 Ch. 926, 933. (2) (1888) 38 Ch. D. 295.

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sub-section contains not only words of art, and words like "appurtenant to" or "appertaining to," but wide general words such as "easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, ... or at the time of conveyance demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to, the land, houses or other buildings conveyed, or any of them." Now here was an advantage which was certainly enjoyed at the time of the conveyance with the house which was conveyed. I agree with Russell J. that upon his finding of fact it appears that within the words used in the sub-section this right or privilege would pass enabling the plaintiff to make use of a roadway, which begins from the gates abutting on Gower Street for the purpose of reaching by the shortest possible route the point where the double gates abut on the garden at the back of No. 16.

Russell J. then says: "But the point against her arises under sub-s. 4, which provides that s. 6 shall apply only if and so far as a contrary intention is not expressed in the conveyance." It is not necessary to determine precisely what is the effect of that sub-section. It may be, and I am inclined to agree with my learned brothers who have pointed it out, that it ought to be divided into two limbs, the first being that the "section applies only if and as far as a contrary intention is not expressed in the conveyance," and the second being, "and shall have effect subject to the terms of the conveyance and to the provisions therein contained," if there are provisions which modify the user of the easements, rights and advantages enjoyed and which pass under sub-s. 2. But Russell J. looked closely at the words of the conveyance and found a contrary intention expressed in them. I may here point out—and it may be important at some time to consider what the precise meaning is—that the words in sub-s. 4 are "as far as the contrary intention is not expressed." It is not suggested in any of the cases that that must be an expression in absolute terms, but it is worth noting that the word used in that sub-section is "expressed" and not, as in some

other cases—and I take particularly the Interpretation Act of 1889, s. 38, sub-s. 2—"unless the contrary intention appears." Now the parcels and habendum in the conveyance are these. [His Lordship read them and continued:] Russell J. has found, from the fact that there was an expression of this right of way or passage leading into Gower Street coloured green upon the map, that there was a contrary intention expressed within sub-s. 4 of s. 6 of the Act. No doubt we cannot look at the habendum for the purpose of enlarging the parcels, but we may look at the habendum to see what its terms are as to the easements and privileges in the nature of easements; and there we find that it is "To hold the same subject to and with the benefit of all such easements and privileges in the nature of easements as are now subsisting in respect of the property hereby conveyed." When I look at that and bear in mind the effect of sub-s. 2 of s. 6, it appears to me that I must find something unequivocal if I am to conclude that a contrary intention has been expressed to what prima facie is effected by the passages which I have read. Russell J. puts it in this way: "Is there in this conveyance an intention expressed that s. 6 shall not apply? In my opinion there is. This is a strong case for the application of the maxim Expressio unius est exclusio alterius. If the parties intended s. 6 to confer on the plaintiff a right to use the roadway from the back of No. 16 to Gower Street it is strange that there should be an express grant to her of a right of way over only four feet of the roadway which she claims to be entitled to use." It has been said by a succession of judges that this maxim, "Expressio unius exclusio alterius," is one which is to be cautiously applied. The other maxim of the same kind is "Expressum facit cessare tacitum." Both of those have been remarked upon; and Lord Campbell in *Saunders* v. *Evans* (1), referring to this so-called rule, says that it "is not of universal application. It depends upon the intention of the parties as it can be discovered upon the face of the instrument or upon the transaction." Later,

(1) (1861) 8 H. L. C. 721, 729.

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Farwell L.J., referring to two cases in which the same maxim had been mentioned, says in *Lowe* v. *Dorling & Son* (1): "In *Colquhoun* v. *Brooks* (2) Wills J. says: 'I may observe that the method of construction summarised in the maxim, "Expressio unius exclusio alterius," is one that certainly requires to be watched. . . . . The failure to make the "expressio" complete very often arises from accident, very often from the fact that it never struck the draftsman that the thing supposed to be excluded needed specific mention of any kind.' Lopes L.J. in the Court of Appeal (3) says: 'The maxim "Expressio unius exclusio alterius" has been pressed upon us. I agree with what is said in the Court below by Wills J. about this maxim. It is often a valuable servant, but a dangerous master to follow in the construction of statutes or documents.'" It will be observed that Wills J. (and Farwell L.J. comments with approval upon that) speaks of it as a method of construction, and I think it would be far safer to regard this so-called rule as not a rule of law, but a canon of construction to be applied in appropriate cases. Russell J. appears to me to have taken it as a rule and as if he was applying a rule of law which compelled him to look at what was expressed in order to see what was also thereby excluded. I think that the right way in which to approach this conveyance is to bear in mind, as has been said in the other cases, the circumstances and facts existing at the time and what was the privilege being enjoyed, and then to remember that sub-s. 2 would carry in the conveyance those privileges and advantages which were at the time of the conveyance enjoyed, and finally to see whether or not it is necessary to exclude them having regard to the terms of the conveyance.

I cannot myself suppose that the double gates at the back of No. 16 have been put up unless for some purpose, or that the useful, and indeed almost necessary, practice of taking coals in and dust out by that means was not a privilege enjoyed at the time when the conveyance took

(1) [1906] 2 K. B. 772, 785. (2) (1887) 19 Q. B. D. 400, 406.
(3) (1888) 21 Q. B. D. 52, 65.

place, and it appears to me that the words used in the conveyance, coupled with the operation of sub-s. 2 of s. 6, are abundant to convey to the plaintiff this right to use the roadway. I ask myself then: Are there words which retract from the privilege or advantage enjoyed? When one comes to look at the passage relied upon by Russell J. it is by no means easy to construe. It refers to a road or way at the back of the buildings and subsequently to the way or passage leading into Gower Street; the way or passage is coloured green, and the way or passage so coloured green is to be kept in repair by the occupiers of all the houses paying a proportionate part of the expense of keeping it in repair. One is tempted to suppose that the reason why the way or passage is spoken of, in contradistinction to the road or way at the back of the buildings, may be that it is the way or passage coloured green which alone is to be the subject of the contribution by the owners of the houses. On the other hand, it does not appear to me that one can get that antithesis clearly cut in the passage. The whole sentence is obscure, but I find it very difficult to hold that all that is referred to is the way or passage coloured green, and that I am to discard the meaning of the words "road or way at the back of the buildings" as simply being a synonym for "the way or passage coloured green." On careful consideration it is by no means easy to derive any clear indication of what is dealt with in that portion of the conveyance. Under those circumstances, I do not think the maxim or, rather, canon of construction, "Expressio unius exclusio alterius," is appropriate here. I cannot find in that passage a sufficiently clear indication why the way or passage is coloured green and the words "road or way" are also used; there does not appear to be a sufficiently clear intention expressed to comply with sub-s. 4 of s. 6.

Russell J. in a previous case of *Hansford* v. *Jago* (1) had to deal with a similar point. He says, dealing with this very point as to sub-s. 4: "It is a very strong thing to say that, when a section of an Act of Parliament provides

(1) [1921] 1 Ch. 322, 332.

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that a conveyance of land having houses or other buildings on it is to be deemed to include a large number of different matters unless a contrary intention is expressed in the conveyance, the mere fact that the draftsman has elected to include one or two of these matters expressly in the conveyance should operate as an indication of an intention that the remainder should not be included." I agree with that statement. It appears to me to be a wise caution to be applied to such cases as these, and after careful consideration of the terms of the conveyance I do not find it possible to agree with Russell J. in his later decision. I prefer his reasoning in *Hansford* v. *Jago*. (1) It appears to me impossible to find that a contrary intention within sub-s. 4 has been expressed. The result is that the conveyance upon which sub-s. 2 of s. 6 operates does convey the rights which the plaintiff claims in the action. The appeal will be allowed with costs here and below.

WARRINGTON L.J. I am of the same opinion. The plaintiff here claims a right to use a certain road or way from the back of her house round the backs of some other houses adjoining hers, and thence into the street to which the five houses face. She claims that right as a right of way with or without horses, carriages, carts, and so on. The defendants admit that she is entitled to a right of way, but assert that it is a right of way on foot only. That is the question between the parties.

The question turns upon the construction of the conveyance to the plaintiff, which is dated May 4, 1923, affected as it is by the provisions of the Conveyancing Act, 1881, s. 6, sub-ss. 2 and 4. I need not go through the facts. It is sufficient to say that the learned judge has found, and, in my opinion, has rightly found, that at the date of the conveyance to her there was a way with horses, carts and carriages enjoyed with the land and houses conveyed to her. Uncontradicted evidence of user was given. The learned judge accepted that evidence, and on it came to the conclusion

(1) [1921] 1 Ch. 322, 332.

which I have mentioned. The result of that is that under the provisions of the Act of Parliament this conveyance is to be deemed to include, and is, by virtue of the Act, to operate to convey the way so enjoyed with the house the subject matter of the conveyance, but that is subject to a qualification, which is that the section applies only if and as far as a contrary intention is not expressed in the conveyance, and shall have effect subject to the terms of the conveyance and of the provisions therein contained. We are, therefore, thrown back upon the construction of the conveyance to see whether it does on its true construction express a contrary intention, or whether it contains any provisions which so modify the right to be enjoyed by the plaintiff as to reduce it to that which the defendants admit her to possess.

I turn to the conveyance, therefore, to see whether it does contain such a contrary intention or some such provision. I may dispose of the second of those two suggestions at once, because it is quite obvious that unless there is a contrary intention expressed which would exclude the right claimed altogether from the conveyance, there are no provisions which would modify it. On the conveyance I have only a very few words to say. The house is conveyed to the plaintiff, "together with the right for the owners and occupiers for the time being of the property hereby conveyed to use jointly with all other persons for the time being entitled to use the same, the road or way at the back of the buildings"—being the five houses I have mentioned—"and the way or passage leading into Gower Street aforesaid and coloured green on the said plan indorsed on these presents such owners or occupiers paying a proportionate part of the expense of keeping the said way or passage in repair." Now there are many points of difficulty about that. One of them is whether the road or way at the back of the buildings is something distinct from the way or passage leading into Gower Street, and whether there is not a mistake in having coloured green on the plan both of those, what are described as "the road or way" and "the way or passage." If I were looking at the conveyance alone without the colour put upon the plan,

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grammatically I should say that the only part which is to be coloured is what is described as "the way or passage," which is that part which runs south-west into Gower Street. But, however, I only mention that as showing that the express grant is by no means clear as to what it really does grant. It is not clear in another way, and a rather important way, upon this case. It will be observed that it is not confined to foot passengers; it is not the road or way for foot passengers only; there are no words confining it to foot passengers. The only restriction on the conveyance which would in practice confine it to foot passengers is that that which is coloured green is only four feet wide. It is not mentioned in the body of the deed, but it is in fact when you come to scale it only four feet wide. Along a road four feet wide for all practical purposes none but foot passengers could go. You could not take a carriage along there unless it was a pony chair or goat chaise, or something with a wheel base of less than four feet. Accordingly, what is there described is a restricted right of way, restricted not in express terms, but because when you come to compare the description with the plan you find that that which is described in the body of the deed as coloured green is only about four feet wide. It is undoubtedly restricted. There is added to the grant of way a condition that the owner or occupier is to pay a proportionate part of the expense of keeping the said way or passage in repair. Curiously enough that is confined to the way or passage, and does not extend to the road or way. The way or passage is that part of the green which runs down to Gower Street, as I have already explained.

A contention on the part of the defendants, accepted by Russell J., was this, that because there is a way of a certain nature expressly granted, thereby and by that circumstance alone the exclusion of the general words contained in the Conveyancing Act is effected. With all respect to the learned judge I cannot follow that, and there are two reasons why I cannot follow it. It seems to me that the existence of the general right is not in this case at all events inconsistent with the special and limited right

granted by this conveyance, for the reason that it is quite possible that this restricted right, or restriction which describes it, is inserted for the purpose of defining, and narrowly defining, that portion over which the liability to contribute to repair was to extend. But there is a still more forcible reason for not so reading this conveyance, and that is that in the habendum the property is said to be granted "to hold the same"—"the same" there would include or would be that which is granted; it is not only the house but the easements which are expressed to be granted with it—"to hold the same subject to and with the benefit of all such easements and privileges in the nature of easements as are now subsisting in respect of the property hereby conveyed and the said adjoining property of the vendor." That is "subject to," so far as the advantage of the vendor is concerned, and "with the benefit of" so far as the advantage of the purchaser is concerned: it is a mutual provision giving to each the benefit of privileges in the nature of easements now subsisting in respect of the property conveyed and the property adjoining of the vendor. We must remember that we have to read this conveyance under the Act as if the words "conveying to the purchaser this right enjoyed with the premises" were actually inserted in the conveyance, and we have, as the contrary intention, to find words which would exclude them from the conveyance. Although I thoroughly agree that you cannot read a habendum as enlarging the description of the parcels, on the other hand it seems to me that when you have the habendum in such terms as we have it here, it is strong evidence that the parties to this conveyance acted on the assumption that the easements and privileges in the nature of easements then subsisting would pass to the purchaser and, therefore, that the words expressed in the statute would not be excluded from the description in the deed.

On these grounds only I think that the judgment of Russell J. was incorrect, and that the appeal ought to be allowed.

Several other points were before the learned judge, but it

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is sufficient for the result of this appeal to deal with one, with which the Master of the Rolls and I myself have dealt.

I think that the appeal ought to be allowed and a declaration made substantially in accordance with the notice of appeal. I suggest that the words "subject to the necessity for repair" might be limited to the way or passage running out into Gower Street.

SARGANT L.J.: I am of the same opinion. With the greater part of the judgment of Russell J. I entirely agree. I think that he was quite right in holding that there was actually enjoyed at the date of the conveyance access to and from the back gate of No. 16 over the yard, and I agree with him that, that being so, prima facie and apart from the operation of sub-s. 4, sub-s. 2, of s. 6 of the Conveyancing Act, 1881, caused the conveyance to carry to the purchaser an easement in accordance with the right that was actually being enjoyed at the time. I think it is important to point out that because the words are in the statute and do not appear in the conveyance they must not be looked upon as mere implied words or anything of the sort. Lindley L.J. said in terms that it must be looked on as being an express grant, though no doubt an express grant which may fail altogether if an intention is expressed to exclude it, or may be limited if an intention is shown to limit it. It is a little difficult to see how that is to be dealt with in practice, but I think perhaps the way to regard it may be this, to consider that in such a conveyance there is added to the parcels a printed form of words such as you find in the common form printed forms of clause, and that then if the conveyance expresses an intention to exclude, you may consider that printed form of words struck out in ink and removed from the conveyance in that way; while, if an intention is shown to limit or alter the form, the limitation or alteration being introduced in the particular conveyance would of course prevail, according to the ordinary rules of construction of such documents, over the common form which you find in the print. It may be that that would practically give effect

to the provisions of the statute, but it is to be noticed that it is by way of express grant that it operates and not by way of implied grant, and that it is for the grantor who seeks to show that that express grant is limited to prove affirmatively that there is some limitation of that express grant.

In this case I think the learned judge attached too much importance to the maxim "Expressio unius exclusio alterius." I think here that even if there had been a mere limited grant of way and nothing else, that would not of itself be sufficient to exclude the larger right of way which is given by the statute. To my mind the view taken by the learned judge of sub-s. 4 in *Hansford* v. *Jago* (1), which has been quoted by my Lord, is a perfectly sound and proper view to take of that sub-section. But here I do not think we are in as great a difficulty as we might be in if there was a clean, clear grant of a limited right of way without more. I find very great difficulty myself in construing this special grant of the right of way at all. I am not sure that "the road or way" is intended to be the same grant as "the way or passage." I do not know whether the way or passage only was to be coloured green, or whether the road or way was also to be coloured green, or whether the way or passage or road or way should be coloured green along its whole length or only as regards so much of its length as led directly into the street. But to my mind, if there had been any doubt apart from the words to which I am going to refer, the really decisive words are to be found in the habendum—namely, "with the benefit of all such easements and privileges in the nature of easements as are now subsisting in respect of the property hereby conveyed." It is immaterial for the present purpose that those words may not enlarge in any way that which is granted by the parcels, for nevertheless it seems to me impossible to suppose that, if the grantor had intended to limit the right which is prima facie given by the statute, to cut out the general right of way and to give only a limited right of way, he could have allowed to be inserted in any part of the conveyance, whether in the parcels or in the habendum,

(1) [1921] 1 Ch. 322, 332.

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those words "with the benefit of all such easements and privileges," and so on. It seems to me that that does show an intention, though it may be an ineffective intention as a matter of strict grant, to preserve the easements or quasi easements or advantages actually existing according to the user of the property at the time of the grant.

I agree that the appeal should be allowed.

Solicitors for appellant: *Maude & Tunnicliffe, for E. J. Hall, Bilston.*

Solicitors for respondents A. E. Jenks & Cattell, Ld.: *Rawle, Johnstone & Co., for Fowler, Langley & Wright, Wolverhampton.*

Solicitors for respondent Richards: *Ward, Bowie & Co. for Howard Cant & Cheatle, Birmingham.*

R. M.

ASTBURY J. 1926 May 11.

NATIONAL SAILORS' AND FIREMEN'S UNION OF GREAT BRITAIN AND IRELAND *v.* REED.

[1926. N. 576.]

Trade Unions—Right to strike—Where no Trade Dispute, Strike called by Trades Union Congress Committee illegal—Persons taking part in such Strike not protected by Trade Disputes Act, 1906 (6 *Edw.* 7, c. 47)*—Trade Union Funds—Fiduciary character—Illegal to use them in Strike Pay in Case of illegal Strike.*

A general strike called by the Trades Union Congress Council in a trade where no trade dispute can be shown to exist is illegal. Persons inciting or taking part in such a strike are not protected by the Trade Disputes Act, 1906, and trade unionists who refuse to obey the order to strike cannot be deprived of their trade union benefits.

Trade union funds are held in a fiduciary capacity and cannot legally be used for or depleted by paying strike pay to any member of a union who illegally ceases to work.

Branch officers of a Union, who called a strike on instructions from an outside body without the authority of their own central executive and without the ballot prescribed by the rules, restrained by injunction.

THIS was a motion in which the plaintiff Union asked for a declaration that the defendants, as branch secretary and delegates of the Tower Hill branch of the plaintiff Union,

were not entitled, in the name of the plaintiff Union, to call members of the plaintiff Union on strike or to call upon members of the plaintiff Union to leave their employment without the authority of the executive council of the plaintiff Union, and for an injunction to restrain the defendants from so doing.

The facts and arguments appear fully in the judgment.

Luxmoore K.C. and *R. F. Roxburgh* for the plaintiff Union
The defendants appeared in person.

ASTBURY J. This is a motion in an action brought by the National Sailors' and Firemen's Union of Great Britain and Ireland against a number of defendants who are officers or officials of a branch in London of the plaintiff Union, seeking an injunction to restrain the defendants, as branch secretaries or officials of the Union or in the name of the Union, calling members of the plaintiff Union out on strike or calling upon members of the plaintiff Union to leave their employment without the authority of the executive council of the Union. The defendants have appeared in person and they have given me considerable assistance in dealing with this matter, which I am bound now to do. I will try and state as clearly as I can the facts which have been proved in the evidence which has been filed upon this motion.

The facts are as follows. First a serious crisis has arisen in the country with regard to the dispute in the mining industry. The General Council of the Trades Union Congress have assumed control of this dispute and have called upon all affiliated unions to the Trades Union Congress to cease work if required by the General Council. The General Council has called a so-called general strike, and the defendants have kindly explained to me the nature of that strike which has been so called. A large number of unionists throughout the country in railway, transport, and other trades have been called upon by the Trades Union Council to come out on strike. The defendants are the branch secretary and delegates of the Tower Hill branch of the plaintiff Union, and they

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intend to take instructions from the Trades Union Congress and not from the executive council of their own Union in relation to the matter in question. The Tower Hill branch of the plaintiff Union has, without the authority of that Union, passed a resolution endorsing the action of the Trades Union Congress in calling a general strike, and that resolution is in these terms: "We, the members of the Tower Hill Branch of the National Sailors' and Firemen's Union endorse the action of the Trades Union Congress General Council in calling the general strike, and pledge ourselves to do all in our power to help them, and we call on the branch secretary and officials to notify all members to cease work immediately." In pursuance of the above resolution, the defendant Stuart has issued the following notice. It is written on the plaintiff Union's paper, it is addressed from 27 Plough Road, Rotherhithe, and dated May 4. It is in these terms: "All members of the Sailors' and Firemen's Union except men on articles of agreement are to come out in support of the Trade Union Council's policy and are to picket their jobs." Mr. Stuart signs that as acting secretary, and he has explained to me in Court what it means, and the other defendants are apparently in agreement with him. I have been told that that policy therein referred to is the policy of the Trades Union Congress in trying to induce and promote a general strike throughout this country. In addition to the resolution of the Tower Hill branch, which I have already read, they passed a further one as follows: "We, the members of the Tower Hill branch, express our confidence in the secretary and officials of this branch"—whom I have had the pleasure of seeing and hearing—"and we will support them in carrying out the instructions of the Trades Union Congress General Council." I have been informed by the defendants that those instructions are to come out on strike. The general president of the plaintiff Union, Mr. Havelock Wilson, has made an affidavit in which he has proved a number of the matters I have referred to, and in para. 3 he says this: "Having regard to the present emergency the attitude of the above-named defendants is one of national importance inasmuch as beyond

it causing a breach of agreements with shipowners it is an interference with the food supply on which the nation is dependent." According to the rules of the plaintiff Union certain trade union benefits are given to the members of the Union under certain conditions. One of these conditions is that without the consent of a two-thirds majority assured no general strike—that means no strike in the Union itself—shall be proclaimed, and in r. 16, sub-r. 3, there is a provision referring to members "wilfully and persistently doing or suffering any act or thing in contravention of any of these rules or of any lawful resolution of the Executive Council." According to the evidence before me certain members of the plaintiff Union have been misled and compelled in London by the defendants and their pickets to leave their ships and to suffer serious loss and damage, and have been placed in doubt as to their position as members of this Union. These acts on the part of the defendants have been done without the authority of the plaintiff Union and contrary to its rules and orders, and lastly, no strike has been called by the plaintiff Union, and no ballot of its members, as provided for by its rules, has been completed. In these circumstances the plaintiff Union seeks the injunction which I have referred to, and the learned counsel who has appeared for the Union bases his right to claim this injunction on two grounds: one, that the defendants have acted in breach of the rules and orders of the Union and are liable to be restrained as prayed, and secondly, that they have acted contrary to the common law of this country.

I will endeavour now to state what I apprehend is the law upon this matter. To take the more general ground first, it is evident from the facts above mentioned and from the rest of the evidence that has been filed that members of the plaintiff Union have been placed in a position of doubt and danger, and it is my duty, as I have been requested by the plaintiffs and defendants to do, to state shortly their rights and those of their Union. The so-called general strike called by the Trades Union Congress Council is illegal, and persons inciting or taking part in it are not protected by the

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Trade Disputes Act, 1906. No trade dispute has been alleged or shown to exist in any of the unions affected, except in the miners' case, and no trade dispute does or can exist between the Trades Union Congress on the one hand and the Government and the nation on the other. The orders of the Trades Union Congress above referred to are therefore unlawful, and the defendants are acting illegally in obeying them, and accordingly (for the reason I shall state under the other head) can be restrained by their own Union from doing so. The plaintiffs' counsel has contended that if the members of the plaintiff Union stay in their jobs and refuse to strike they cannot be deprived of their trade union benefits, and the defendants who have appeared before me have stated, and stated very properly, that it is important to them that their members should know their rights in this respect.

Now the law upon that matter is as follows. No member of the plaintiff Union or any other trade unionist in this country can lose his trade union benefits by refusing to obey unlawful orders, and the orders of the Trades Union Congress and the unions who are acting in obedience thereto in bringing about the so-called general strike are unlawful orders, and the plaintiff Union is entitled to have this fact made clear and brought to the attention of its members.

Mr. Luxmoore has further contended that those members of the plaintiff Union who obey this order to strike will not be entitled during the continuance of the strike to receive any strike pay from their Union, and the defendants have, again very properly, and I think very fairly, stated that it is their desire that they should know, and that their members should know, their rights in this respect. Trade Union funds in this country are held in a fiduciary capacity and cannot legally be used for, or depleted by, paying strike pay to any member who illegally ceases to work and breaks his contract without justification in pursuance of orders which are unlawful, and this fact also is one that the plaintiff Union is entitled and bound to make clear to its members in the difficult position in which they have been placed.

With regard to the other ground upon which the plaintiff

Union seeks to obtain this injunction the matter is beyond question. The defendants, in addition to acting, as above said, in defiance of the law, have acted contrary to the rules and orders of their own Union, and are on this ground also liable at the suit of that Union to be restrained by injunction from continuing to do so.

The result is that there must be an injunction until the trial or further order substantially in the terms of the notice of motion, which can be settled later, or the defendants may, if they prefer it, give an undertaking in those terms. I was desirous during the hearing of assisting the defendants, as far as I was able to do so, in coming to a conclusion whether they would prefer to give this undertaking or be restrained by injunction. They agreed that they would like to know their rights before deciding which course to adopt. I have done my best to explain those rights as I understand them. I will now ask the defendants to agree among themselves whether they prefer that the injunction should be granted in invitum or to give an undertaking substantially in the same terms.

[The defendants after discussion decided that they would prefer that the injunction should be granted.]

Solicitors: *Vizard, Oldham, Crowder & Cash.*

P. J. B.

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Jan. 13, 14, 15, 19, 20; *Feb.* 19.

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[1924. A. 1625.]

Electricity—"Supply"—Area of Supply—Point of Supply—Consumer's Terminals—Premises partly within and partly without Area of Supply—County of London (Northern Extensions) Electric Lighting Order, 1897, *ss.* 2, 5, 6, 9—*Electric Lighting Act,* 1882 (45 & 46 *Vict. c.* 56), *ss.* 4, 18—*London Electric Supply Act,* 1908 (8 *Edw.* 7, *c. clxvii.*), *s.* 8—*Electric Lighting Act,* 1909 (9 *Edw.* 7, *c.* 33), *ss.* 5, 6, 23.

The defendants were authorized by the County of London (Northern Extensions) Electric Lighting Order, 1897, made under the Electric Lighting Acts, 1882 and 1888, to supply electricity within an area adjoining the relators' area of supply. Sect. 6 of the Order prohibited the supply of energy by the defendants beyond their area of supply, and the Electric Lighting Act, 1909, s. 23, contains a general prohibition against supplying energy outside an authorized area. The defendants, however, entered into a contract to supply a firm having a small part of its premises within the defendants' area of supply, and the remainder of the premises in the relators' area of supply. For the purpose of this contract the defendants erected their apparatus on the part of the premises of the firm within their area, and the consumers' terminals, that is, the point where the electricity was passed from the defendants' service lines to the lines on the firm's premises owned and controlled by them, were also on that part of the premises. The use of electricity on this part of the premises was trivial. In these circumstances the Attorney-General brought this action on the relation of the relators to restrain the defendants from supplying energy to the firm outside their area:—

Held, on the construction of the Electric Lighting Acts and of the defendants' Order that the point of supply was the consumers' terminals, and that as the firm's terminals were within the defendants' area, the defendants had not committed any breach of the prohibitions in their Order and the Act of 1909.

Gas Light and Coke Co. v. *South Metropolitan Gas Co.* (1889) 62 L. T. 126 and *Attorney-General* v. *West Gloucestershire Water Co.* [1909] 2 Ch. 338 distinguished.

Attorney-General v. *Leicester Corporation* [1910] 2 Ch. 359 applied.

The following statement of the facts is taken from the judgment of Tomlin J.:—

"There is situate on the east of Gray's Inn Road a block of property bounded on the west by Gray's Inn Road, on the north by Wilson Street, on the east by Gough Street, and on the south by Elm Street. This property (except a portion

in the south-west corner formed by the junction of Gray's Inn Road and Elm Street) was in or about the year 1922 acquired by Messrs. E. E. Hulton, Ld. (hereafter referred to as 'Messrs. Hultons'), a firm of printers, for the purpose of erecting large printing works.

The boundary between the borough of St. Pancras and the borough of Holborn formerly ran east and west through the property somewhat to the south of its centre, but by an Order in Council, dated May 15, 1900, and made under the London Government Act, 1899, the boundary was moved further south, bringing the whole of the property within the borough of St. Pancras.

The relators, the St. Pancras Borough Council, as the successors of the Vestry of St. Pancras, are, and have been at all material times, authorized, under the St. Pancras Electric Lighting Order, 1883, made under the Electric Lighting Act, 1882, and confirmed by the Electric Lighting Orders Confirmation (No. 7) Act, 1883, to supply electricity within an area of which the old boundary between the two boroughs formed, in the neighbourhood of the property in question, the southern boundary.

The defendant company are, and since 1897 have been, under the County of London (Northern Extensions) Electric Lighting Order, 1897, made under the Electric Lighting Acts, 1882 and 1888, and confirmed by the Electric Lighting Orders Confirmation (No. 9) Act, 1897, authorized to supply electricity in an area corresponding with the borough of Holborn.

The transfer to which I have referred of part of the borough of Holborn to the borough of St. Pancras, under the Order in Council of 1900, did not, in the events which had happened, affect the powers of the defendants within the area transferred, or extend the area of supply of the relators. The result is that the area of supply of the relators extends southwards only to the old boundary of the borough of St. Pancras, and includes the northern part, but does not include the southern part of the property in question, while the area of supply of the defendants extends northward as far as such old

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boundary, and includes the southern part, but does not include the northern part of such property.

Messrs. Hultons having completed part of their proposed buildings, approached the relators to negotiate terms for a supply of electricity, the relators being then erroneously under the belief that their area of supply included that portion of their borough which had been transferred from the borough of Holborn. Ultimately these negotiations were broken off, and Messrs. Hultons entered into a contract for a supply of electricity with the defendants. The maximum demand which Messrs. Hultons were entitled to make under the contract was fixed by reference to their requirements calculated upon the footing of what such requirements would be when all the buildings which they contemplated erecting on the property were completed. At present their main building (one of several stories) is situate on the part of the property north of the old boundary, and abutting on Gough Street, but there is also a building (at present of one storey) connected with the main building, but situate south of the old boundary, and abutting on Gough Street and Elm Street. Messrs. Hultons contemplate erecting other buildings both north and south of the old boundary line. At the extreme south end of the one storey building in the corner formed by the junction of Gough Street and Elm Street there is a chamber separated from the remainder of such building by a partition wall in which is a connecting door.

In pursuance of their arrangements with Messrs. Hultons the defendants have erected in this chamber, first, on the south-west part thereof three transformers with a suitable switchboard, or switchboards, into which the defendants pass, at a high voltage, and in the form of alternating current, the electricity from their mains, and in which they transform the current to a lower voltage; secondly, near the centre of the chamber, two rotary converters, which receive the current from the transformers, and convert it from alternating into direct current; thirdly, on the east wall a switch board and meters to and through which the electricity in the form of direct current and at a reduced

voltage is led from the converters. The whole of the apparatus up to and including the meters and the last mentioned switchboard (which I will call switchboard No. 2) belongs to and is under the exclusive control of the defendants.

Two sets of cables run from switchboard No. 2 to and through a third switchboard on the northern end of the west wall of the chamber, and thence pass through the partition wall, traverse the remainder of the one storey building and reach a distributing board in the main building, from whence the electricity is distributed to the several points in the main building where it is required. Between the third switchboard and the main building there is however taken from the two sets of cables further lines to supply a gas producing plant in the north part of the one storey building and to provide lighting in such part and also certain lights south of the partition wall. The portion of the chamber south of the partition wall in which the defendants' machinery is situated is lighted by current provided by the defendants and not included in the supply to Messrs. Hultons.

The cables running from switchboard No. 2 and all apparatus on Messrs. Hultons' side of such switchboard, including the third switchboard, is the property of and exclusively under the control of Messrs. Hultons.

The two sets of cables afford two alternative means of supply, and the purpose of the third switchboard is to enable Messrs. Hultons to regulate the supply at will by cutting off one or other or both of the two lines of supply. The supply to the gas producing plant can be connected with either of the two sources of supply and regulated to that extent.

The amount of electricity at present being consumed upon the land south of the old boundary is trivial compared with that being consumed on the land north of such boundary. The total amount now being consumed is considerable, but is about half only of the maximum requirement under the contract.

A supply of electricity is being given by the defendants to Messrs. Hultons in the circumstances and by the means which I have indicated, and this action has been commenced

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by the Attorney-General at the relation of the relators to restrain what is being done, on the footing that so far as the electricity is being consumed by Messrs. Hultons on the land north of the old boundary, such electricity is being illegally supplied by the defendants outside their area of supply."

The County of London (Northern Extensions) Electric Lighting Order, 1897, contains the following material sections :—

Sect. 2. "This Order is to be read and construed subject in all respects to the provisions of the Electric Lighting Acts, 1882 and 1888, and of any other Acts or parts of Acts incorporated therewith which said Acts and parts of Acts are in this Order collectively referred to as 'the principal Act' and the several words terms and expressions to which by the principal Act meanings are assigned shall have in this Order the same respective meanings provided that in this Order . . . . The expression 'service line' shall mean any electric line through which energy may be supplied or intended to be supplied by the undertakers to a consumer either from any main or directly from the premises of the undertakers. . . . .

"The expression 'consumer's terminals' shall mean the ends of the electric lines situate upon any consumer's premises and belonging to him at which the supply of energy is delivered from the service lines."

Sect. 5 defines the area of supply.

Sect. 6. "The undertakers shall not at any time after the commencement of this Order supply energy or (except for the purposes of this Order) erect or lay down any electric lines or works beyond the area of supply otherwise than under the authority of Parliament or under a licence granted by the Board of Trade under the principal Act. . . . ."

Sect. 9. "Subject to the provisions of this Order and the principal Act the undertakers may supply energy within the area of supply for all public and private purposes as defined by the said Act. . . . ."

Sect. 27 imposes an obligation on the undertakers to give a supply of energy in accordance with the provisions of the Order or the Board of Trade Regulations upon being required

to do so by the owner or occupier of premises within fifty yards from any distributing main of the undertakers subject to certain provisos of which the last two are as follows: "Provided also that if the owner or occupier of any such premises as aforesaid uses . . . . the energy supplied to him by the undertakers for any purposes or deals with it in any manner so as to unduly or improperly interfere with the efficient supply of energy to any other body or person by the undertakers the undertakers may if they think fit discontinue to supply energy to such premises so long as such user continues. Provided also that the undertakers shall not be compelled to give a supply of energy to any premises unless they are reasonably satisfied that the electric lines fittings and apparatus therein are in good order and condition and not calculated to affect injuriously the use of energy by the undertakers or by other persons. . . . ."

Sect. 28. "The maximum power with which any consumer shall be entitled to be supplied shall be of such amount as he may require to be supplied with not exceeding what may be reasonably anticipated as the maximum consumption on his premises. . . . ."

Sect. 30. "Whenever the undertakers make default in supplying energy to any owner or occupier of premises to whom they may be and are required to supply energy under this Order they shall be liable to a penalty not exceeding forty shillings in respect of every such default for each day on which any such default occurs. . . . ."

Sect. 35 gives power to appoint electric inspectors, and provides: "The duties of an electric inspector under this Order shall be as follows: (*a*) The inspection and testing periodically and in special cases of the undertakers' electric lines and works and the supply of energy given by them; . . . ."

Sect. 39. "An electric inspector if and when required to do so by any consumer shall on payment by the consumer of the prescribed fee test the variation of electric pressure at the consumer's terminals. . . . ."

Fourth Schedule, s. 2. "Where the undertakers charge any consumer by the electrical quantity contained in the supply

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given to him they shall be entitled to charge him according to the rates set forth in section 1 of this Schedule the amount of energy supplied to him being taken to be the product of such electrical quantity and the declared pressure at the consumer's terminals. . . . ."

Sir Thomas Hughes K.C., *Greene K.C.* and *Norman Daynes* for the plaintiffs. By the County of London (Northern Extensions) Electric Lighting Order, 1897, ss. 5, 6 and 9, which was made under the Electric Lighting Act, 1882, s. 4, and the Amending Act of 1888, the defendants are authorized to supply electricity within an area which includes only a small part of Messrs. Hultons' premises, and they are not entitled to supply electric energy to the remainder of the premises which are outside their area. The electricity used by Messrs. Hultons within the area is trivial, and the defendants cannot justify what they are doing by the fact that that part of the apparatus connected with the supply which is in their control is entirely within their area. Electricity is supplied at the point where it is consumed, as in the case of gas and water: *Gas Light and Coke Co.* v. *South Metropolitan Gas Co.* (1) and *Attorney-General* v. *West Gloucestershire Water Co.* (2) This view receives support as regards electricity from *Attorney-General* v. *Metropolitan Electric Supply Co.* (3) and *Attorney-General* v. *Southport Corporation* (4), where it was held that s. 23 of the Electric Lighting Act, 1909, prevented the supply of electricity for working a tramway outside the area of supply. The position in regard to electricity was also considered in *Attorney-General* v. *Leicester Corporation* (5), and it may seem at first sight to be contrary to the plaintiff's contention. But the real question in that case was whether or not a certain class of business was ultra vires or sanctioned by the provision in s. 10 of the Electric Lighting Act, 1882, that undertakers authorized to supply electricity might "enter into such contracts and

(1) 62 L. T. 126.
(2) [1909] 1 Ch. 636; [1909] 2 Ch. 338.
(3) [1905] 1 Ch. 24, 757.
(4) [1923] 1 Ch. 548; [1924] A. C. 909, 918.
(5) [1910] 2 Ch. 359, 370.

generally do such acts or things as may be necessary and incidental to such supply." The meaning of "supply" was only considered from that aspect, and held to mean the supply of energy to the consumer at his terminals. In *Attorney-General* v. *Sheffield Corporation* (1) Eve J. merely followed the decision in *Attorney-General* v. *Leicester Corporation*. (2)

The defendants' Order, the County of London (Northern Extensions) Electric Lighting Order, 1897, limits the area of supply (s. 5), and negatives the right to supply energy outside that area (s. 6). "Supply" in that Order means supply at the point of use and not supply at the consumer's terminals, which are within the defendants' area of supply. But even if the latter meaning were given to "supply" a further question would arise, whether the fact that Messrs. Hultons, to the knowledge of the defendants, were using the energy supplied outside the defendants' area of supply does not render the whole supply ultra vires. A limitation as to area of supply is also contained in s. 23 of the Electric Lighting Act, 1909.

[TOMLIN J. Does not the proviso to that section seem to contemplate that a person receiving a supply within the area of supply can use it in part outside that area ?]

It is submitted not. That proviso refers to a company or person whose business is not primarily that of supplying electrical energy affording a supply to some one else. Its application is limited therefore to the case where some private person makes his own electricity, but allows some one else to have part of the supply.

If the defendants' contention were correct they would be at liberty to supply electricity for use wholly outside the area so long as the consumer had a piece of ground inside the area on which his terminals could be placed. That is contrary to the general scheme of the Acts, which allots areas to electric undertakers and intends them not to operate outside those areas.

[TOMLIN J. Does not the Electric Lighting Act, 1882,

(1) (1912) 106 L. T. 367. (2) [1910] 2 Ch. 359.

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s. 18, suggest that when once an undertaker has supplied energy at the consumer's terminals he has no concern with how the consumer uses it ?]

There is nothing in that section to indicate that the energy is supplied at any other point than that where it is used, and all that the section provides is that the undertakers cannot control the particular mode of user. "Supply" does not mean the place of delivery but the point where it is consumed. It is by the fact of user that the consumer is supplied. Without user there is no supply. The case of electricity is really stronger than that of gas in this respect. There is nothing in the Electric Lighting Act, 1882, ss. 4, 10, 18 and 19, inconsistent with this view. In the defendants' Order ss. 5 and 6 give effect to the scheme of giving each undertaker a particular area of supply out of which he cannot go. The definition section (s. 2) shows that the consumer's terminals are the point at which the supply passes from the service line. The expression "consumer's terminals" appears also in s. 39, which provides for testing the electric pressure at that point, s. 58, which provides that the meter shall be between the undertaker's mains and these terminals, and Sch. 4, s. 2, which relates to charges for the supply of energy. The London Electric Supply Act, 1908, s. 8, provides for supplying outside the area in certain special cases, but it indicates that supply cannot be separated from user.

Clauson K.C., *Tyldesley Jones K.C.* and *D. B. Somervell* for the defendants. The plaintiff is not entitled to an injunction in this case, for the defendants are not exceeding their statutory powers in supplying electricity to Messrs. Hultons. On the construction of the relevant Acts and the defendants' Order, electric energy is supplied at the consumers' terminals, and these are within the defendants' area of supply.

In both *Gas Light and Coke Co.* v. *South Metropolitan Gas Co.* (1) and *Attorney-General* v. *West Gloucestershire Water Co.* (2) the offending undertakers had extended their own works outside their area of supply, and they had to justify,

(1) 62 L. T. 126. (2) [1909] 1 Ch. 636; [1909] 2 Ch. 338.

if they could, their trespass. But in any case, *Attorney-General* v. *Leicester Corporation* (1) is directly applicable, and Neville J. definitely decided that "supply" was not at the consumers' terminals. That case was followed in *Attorney-General* v. *Sheffield Corporation*. (2)

Further, there is nothing to suggest anywhere that the undertakers have any responsibility beyond that point of supply, and they cannot be affected by the use then made of the energy supplied. Indeed, there is no means provided by which the undertakers could prevent any user objected to.

The question on the relevant Acts and Order is whether there is any statutory prohibition which the defendants have broken. The Electric Lighting Act, 1882, s. 4, sanctioned the making of Provisional Orders authorizing any local authority, company, or person "to supply electricity for any public or private purposes within any area." A question was raised at one time whether in that section the words "within any area" did not apply rather to qualify "for any public or private purposes" and not "supply electricity." But in the defendants' Order, s. 9, the same words are used in a different order, so as to make it clear that the area referred to is one within which electricity is to be supplied; compare also Electric Lighting Clauses Act, 1889, s. 10. Under s. 6 of the Act of 1882 provision is made for Board of Trade Regulations, and by s. 27 of the defendants' Order they are under an obligation to supply in accordance with those Regulations. Part A, regs. 1, 2, and 25, and Part B, reg. 3, show that the undertakers' obligations all end at the consumers' terminals. Part A, reg. 30, gives a limited power to inspect and discontinue supply: see also Part B, reg. 1. Again, ss. 10 and 18 of the Electric Lighting Act, 1882, show clearly that "supply" and "use" are two entirely separate things, and that the undertakers have no concern with the mode of user. Sect. 28 of the defendants' Order merely limits their obligations, and the only limitations on their powers are contained in s. 6 of that Order and s. 23 of the Electric Lighting Act, 1909. Sect. 31 of the Order gives the undertakers power

(1) [1910] 2 Ch. 359. (2) 106 L. T. 367.

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to charge "for energy supplied," which by s. 48 (subsequently repealed and re-enacted by the Electric Lighting Act, 1909, s. 11) was to be measured at the meter, and this by s. 58 is to be placed between the mains and the consumer's terminals. Thus the whole scheme of the Order shows that energy is supplied at the consumer's terminals, and supply in s. 6 of the Order must have a corresponding meaning.

Nor is there anything in the later legislation to alter the position; compare the London Electric Supply Act, 1908, s. 8, and the Electric Lighting Act, 1909, s. 5, which draw a clear distinction between "supply" and "user." It has been suggested that even if the defendants are supplying within their area, they are supplying it for use outside, and should be restrained by injunction from doing this. The undertakers have no power to interfere with the consumer's apparatus, except to the limited extent mentioned in the proviso to s. 27 of their Order. In this their right to restrict the supply and to inspect are strictly limited: see Electric Lighting Act, 1882, ss. 21 and 24, and the defendants' Order, ss. 27, 55, and the Board of Trade Regulations, Part A, reg. 30. The defendants cannot therefore be made responsible for the consumer's mode of using energy supplied.

Sir Thomas Hughes K.C. in reply. The Electric Lighting Act, 1882, sanctions the making of Provisional Orders authorizing supply of energy for public and private purposes within a particular area. The limitation as to area qualifies "for public or private purposes," and shows that it is the point of user which has to be within the area. The change in the order of the words in the defendants' Order, s. 9, does not indicate an intention to make a difference of meaning. If the area of supply was alone material, the Electric Lighting Act, 1909, s. 5, would appear unnecessary. Further, the plain and ordinary meaning of s. 6 of the defendants' Order is that they are not to supply energy for use outside their area. In considering at what point energy is supplied, it is immaterial where the energy is measured and when the property passes. There is no energy supplied until it is used. The case of electric energy is stronger in this respect

than the cases either of water or gas. There is nothing in the defendants' Order or the Acts to prevent the natural meaning being given to the word "supply," and on a true view of *Attorney-General* v. *Leicester Corporation* (1) Neville J. did not there decide to the contrary.

Cur. adv. vult.

Feb. 19. TOMLIN J. delivered a written judgment, in which, after stating the facts as above, he continued: On the one hand the case made by the plaintiff is substantially as follows: first, that under s. 4 of the Electric Lighting Act, 1882, and ss. 5 and 9 of their own Order the defendants can only supply electricity within their own area of supply, and under s. 6 of their Order are prohibited from supplying electricity beyond their area of supply; secondly, that under s. 23 of the Electric Lighting Act, 1909, the defendants are prohibited from supplying electricity in any part of the borough of St. Pancras, because that is an area in which the relators have authority to supply, and, thirdly, that what the defendants are doing is in fact supplying electricity within the meaning of that expression, as used in the relevant Acts and Order, outside their area of supply and in the area of supply of the relators.

In support of this view the plaintiff cites the decision of the House of Lords in the *Gas Light and Coke Co.* v. *South Metropolitan Gas Co.* (2) upon the effect of s. 6 of the Metropolis Gas Act, 1860, and the decision of Neville J. and the Court of Appeal in *Attorney-General* v. *West Gloucestershire Water Co.* (3) upon the effect of the West Gloucestershire Water Acts and the Acts incorporated therewith, and says that these decisions establish that "supply" in connection with gas and water means "supply for use" or "supply to the point of consumption," and that electricity is for this purpose on the same footing as gas and water, and indeed, having regard to its characteristics, is an a fortiori case, and that therefore the defendants are supplying to Messrs. Hultons not at the terminals of that firm, which are

(1) [1910] 2 Ch. 359.
(2) 62 L. T. 126.
(3) [1909] 1 Ch. 636; [1909] 2 Ch. 338.

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admitted to be at switchboard No. 2 and within the defendants' area of supply, but at the points of consumption, which are to a substantial extent beyond the defendants' area of supply. The plaintiff further says that this view of the effect of the relevant Acts and Order is supported first by the language of s. 5 of the Electric Lighting Act, 1909, and s. 8 of the London Electric Supply Act, 1908, whereby the supply of electricity to railways, tramways, and canals partly outside the area of supply is authorized, and, secondly, by the provisions of s. 6 of the Electric Lighting Act, 1909, relating to a supply in certain cases to premises outside the area of supply, under which provisions orders commonly called Fringe Orders are made.

On the other hand the defendants say first that the meaning of " supply " in the Electric Lighting Acts in a sense contrary to that for which the plaintiff contends has already been determined by Neville J. in *Attorney-General* v. *Leicester Corporation* (1), and that in accordance with the ordinary practice I ought to follow Neville J.'s decision, and, secondly, that if Neville J.'s decision is not to conclude the matter, then upon the true construction of the Acts and Order, supply has reference to supply at the consumer's terminals, and that upon this construction and upon the facts the whole supply given by the defendants to Messrs. Hultons is given within the area of supply and not within the relators' area at all.

Before dealing with the question of construction, I will say a word about the facts. I find (1.) that a substantial part of Messrs. Hultons' property is within the area of supply of the defendants, and that though only a small quantity of electricity is at the moment being consumed on that part, there is reasonable ground to anticipate an increased user in the near future when Messrs. Hultons' building plans are more fully carried out. (2.) That the lines and apparatus situate upon Messrs. Hultons' premises upon their side of switchboard No. 2, belong to Messrs. Hultons and are under their exclusive control, and that the defendants have no

(1) [1910] 2 Ch. 359.

ownership of or control over any of such lines or apparatus. (3.) That the ends of the lines on Messrs. Hultons' premises and belonging to them at which electricity is passed to them from the service lines of the defendants is at or near switchboard No. 2 within the area of supply of the defendants, and (4.) that if "supply" means deliver at the point where the electricity is passed from the service lines of the supplying company to the lines on the consumers' premises belonging to them, i.e., at the consumers' terminals, the supply in the present case is being given in substance and in fact within the area of supply of the defendants.

What, then, is the proper view to take of the meaning of supply? In the first place I may observe that the question is one of the true construction of the relevant Acts and Orders, and I do not think that decisions upon Acts relating to gas and water can be of assistance unless at any rate it be first shown that the legislation with respect to those subject matters is substantially identical with the legislation with respect to electricity, or that such decisions lay down some general principle which is necessarily applicable to all the legislation under consideration.

There are, in fact, appreciable differences in the character of the legislation relating to the several subject matters, and I do not find laid down in the cases to which I have referred any general principle of the kind which I have indicated.

It was pointed out by Lord Halsbury in the *Gas* case (1) in the House of Lords that the Metropolis Gas Act, 1860, was an Act to give effect to an agreement made between the gas companies and referred to in the preamble of the Act, and that the object of that agreement was to create monopoly areas, but no such monopoly areas were created by or under the Electric Lighting Act of 1882, and it was not until s. 23 of the Electric Lighting Act, 1909, came into force that anything like a monopoly character was given by the general law to the area of supply of undertakers authorized to supply electricity. Further, it is plain that whatever relevancy the

(1) 62 L. T. 126, 128, 132.

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Gas case may have to the question which falls for my decision, it did not answer the question whether or not where the consumer's premises were partly in one and partly in another area the consumer could properly be supplied with gas within the area if he used it, or part of it, on that part of the premises which was outside the area. This question was expressly kept open by Lord Herschell.

So far as the *Water* case (1) before Neville J. and the Court of Appeal is concerned, the legislation there under consideration contained indications that "supply" meant supply for use (see s. 56 of the West Gloucestershire Water Act, 1884), and the case itself does not seem to me to do more than determine, first, that the water company had no power to supply outside its own area of supply, and secondly, that upon the facts, whatever "supply" meant, the company was supplying outside the area. There are, in fact, some observations of Neville J. (2) suggesting that his view of supply in that case was narrower than that which the plaintiff presses me to take in the present case.

I come to the conclusion, therefore, that these cases do not fetter me and that I am bound to consider the present question as one to be determined exclusively by reference to the language employed in the relevant Acts and Order. When, however, I approach the matter from that angle, I am met by the contention of the defendants that the question has already been determined by a judge of co-ordinate jurisdiction whose decision I ought to follow. In *Attorney-General* v. *Leicester Corporation* (3) it fell to Neville J. to determine whether having regard to s. 10 of the Electric Lighting Act, 1882, which authorizes undertakers to do all such acts and things as are necessary and incidental to the supply of electricity, the defendant corporation were acting intra vires in supplying electrical fittings and apparatus to consumers to assist them in using and enjoying the electricity supplied, and the learned judge held that this particular activity was not authorized. The process of reasoning by

(1) [1909] 1 Ch. 636; [1909] 2 Ch. 338.
(2) [1909] 1 Ch. 644.
(3) [1910] 2 Ch. 359.

which he arrived at this conclusion was, as I understand it, as follows: In order to ascertain whether what is being done is necessary or incidental to what is expressly authorized, it is necessary to determine what is authorized: the supply of electricity is authorized; "supply" means supply at the consumer's terminals, and therefore, anything which is concerned with assisting the consumer to use or enjoy at the points beyond his terminals that which has been supplied at the terminals is not necessary or incidental to the authorized power to give a supply. Neville J.'s decision was given after citation to him of the *Gas* case (1) in the House of Lords to which I have referred, and he was the judge of first instance in the *Water* case. (2) The *Leicester Corporation* case (3), it is true, was not a decision upon the Order which is before me, but it was a decision upon the Acts which I have to consider and upon an Order which did not differ substantially from that of the defendants. All these Orders follow, more or less, a common form. The substance of his decision seems to me to be that, upon the true construction of the Electric Lighting Acts and Orders made thereunder, "supply" does not mean supply for use or supply for consumption, as in the *Gas* case (1), but supply at the consumer's terminals. That decision has been followed by Eve J. in *Attorney-General* v. *Sheffield Corporation* (4), and I think that I also ought to follow it, unless I can find something in the defendants' Order which puts a different aspect on the present case. I do not find anything of the kind: indeed, an independent consideration of the present case leads me to the conclusion that altogether apart from the two last mentioned decisions of Neville J. and Eve J. I am constrained by the language of the legislation to take a similar view in the present case.

It would occupy too much time to read the several sections which bear upon the matter and to which my attention has been called, and I shall confine myself to summarizing, shortly, the main reasons which, in my judgment, lead to the conclusion at which I arrive. First, I do not think the

(1) 62 L. T. 126.
(2) [1909] 1 Ch. 636; [1909] 2 Ch. 338.
(3) [1910] 2 Ch. 359.
(4) 106 L. T. 367.

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language of the Acts and Order is intended to be read as language of scientific exactitude. Rather it seems to me to be what perhaps I may call work-a-day language selected to make intelligible the purpose of the Legislature (see, for example, the definition of "unit" in the Fourth Schedule to the Order). It is not by a scientific examination into the nature of electricity that the solution of the problem is to be found. Secondly, throughout the Acts and Order I think a distinction is drawn between "supply" and "use" or "consumption." This point is illustrated by the phraseology of the definition of consumer's terminals in s. 2 of the Order as the ends of the service lines at which the supply is delivered, and by the terms of the prohibition in s. 18 of the Act of 1882 against any interference by the undertakers with the manner in which any electricity supplied by them is used. Thirdly, the obligation to supply and the power to supply are not necessarily conterminous, and even if no supply can be demanded except in respect of and for premises wholly within the area, no argument is thereby afforded for limiting the power to supply, if apart from this consideration such power appears on construction to be wider. Fourthly, the obligations and powers of the undertakers in relation to the supply to a particular consumer are, speaking broadly, confined to their own side of the consumer's terminals, and it is upon the undertakers' side or at the consumer's terminals that the amount of the supply has to be measured and its pressure ascertained. Fifthly, the method of user of the supply, unless at any rate it results in interference with an efficient supply by the undertakers to other people, does not concern the undertakers at all or give them any right of inspection on the consumer's side of the terminals, or right to cut off the supply. Sixthly, s. 5 of the Electric Lighting Act, 1909, and s. 8 of the London Electric Supply Act, 1908, do not, in my judgment, afford sufficient ground for displacing the conclusion at which I otherwise arrive. There have been suggested several explanations of those sections consistent with that conclusion and not less plausible than the explanation urged by the plaintiff that their presence is due to the fact

that "supply" means "supply for use." Indeed, s. 5 of the Act of 1909 seems to draw a clear distinction between supply and use (see sub-s. 3). Sect. 6 of the Act of 1909, which relates to the supply of premises outside the area of supply, does not, I think, afford any assistance in the solution of the problem. Lastly, if, as I hold, supply does not mean supply for use or consumption but supply in the sense of delivery at the consumer's terminals, there is nothing in the language of ss. 5 or 6 of the Order or of s. 23 of the Act of 1909 to render illegal that which upon the facts as I have found them the defendants are doing.

It follows that the action fails and must be dismissed with costs.

Solicitors for plaintiff: *Cunliffe, Blake & Mossman.*
Solicitor for defendants: *Sydney Morse.*

H. C. G.

In re DRAKE. (1)

DRAKE *v.* WILSON.

C. A.
1925
May 6, 11, 26.

[1924. D. 952.]

Revenue—Estate Duty—Property passing on Death—Settled Land—Portions Charge—Rateable Recoupment—Assignee for Value of Part of Charge—Incidence of Duty—Contract—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 2, 8, *sub-s.* 4; 9, *sub-s.* 1; 14, *sub-s.* 1.

An assignee for value of a sum of 10,000*l.* to be paid "absolutely and free from incumbrances," being part of a portions fund of 15,000*l.* charged on settled land:—

Held, in the absence of a special contract in that behalf, not to be liable to pay a rateable proportion of the estate duty borne and payable by the portions fund upon the death of the tenant for life of the settled land.

Sect. 14, sub-s. 1, of the Finance Act, 1894, provides for a rateable recoupment between the person who has paid estate duty in respect of property passing on death, and the person entitled to a sum charged on that property. It does not go on to provide for further recoupment

(1) Reported by request.

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by persons entitled derivatively to various parts of the sum so charged, but leaves their rights to be determined by their contractual arrangements.

Decision of Eve J. reversed.

APPEAL from so much of an order of Eve J. dated February 17, 1925, as declared that a sum of 10,000*l.* part of a sum of 15,000*l.* was subject to a rateable proportion of the estate duty payable on the death of the tenant for life of the estates on which the 15,000*l.* was charged.

At the date of the deed poll of April 29, 1910, hereinafter mentioned, an estate in Kent, hereinafter called "the Deptford Estate," stood limited by virtue of certain family settlements and of a disentailing assurance dated April 28, 1910, and in the events which had happened, to the use of W. W. Tyrwhitt Drake for life with remainder to trustees for a term of 1000 years upon certain trusts for raising portions for his younger children, with remainder to Herbert W. Tyrwhitt Drake, the eldest son of W. W. Tyrwhitt Drake, in fee simple.

By a revocable deed poll dated April 29, 1910, W. W. Tyrwhitt Drake charged the Deptford Estate with a sum of 15,000*l.* in favour of his younger son Edward Tyrwhitt Drake.

Herbert W. Tyrwhitt Drake died on March 11, 1915, having made a will dated the same day whereby he devised all his real and personal estate to his brother Edward Tyrwhitt Drake if he survived the war, but if not, then to his uncle Guy Percival Tyrwhitt Drake (therein and hereinafter called Percy Tyrwhitt Drake). The will contained a definition of the termination of the war.

Questions having arisen between Edward Tyrwhitt Drake and Percy Tyrwhitt Drake as to the construction and effect of the will, a family arrangement was made and embodied in an agreement dated February 19, 1917, whereby Percy Tyrwhitt Drake released all his interest to his nephew Edward, who in return agreed to pay his uncle a sum of 10,000*l.*

W. W. Tyrwhitt Drake, the tenant for life, died on July 28, 1919, without having revoked the deed poll, and on his death the Deptford Estate with other large estates of which he

was also tenant for life became subject to estate duty as property passing on his death.

By a deed dated March 21, 1921, to which Percy Tyrwhitt Drake was a party, executed in pursuance of the family arrangement above mentioned, the Deptford Estate and certain other family estates were settled to the use of Edward Tyrwhitt Drake for life, with remainders over in strict settlement, and cl. 29 of the deed provided as follows: "As between the parties to these presents and their respective sequels in title the trustees or trustee for the time being of the said term of 1000 years created by the said Indenture of Disentail shall hold and be deemed to hold the same term upon trusts by means of the powers vested in them by the same indenture to raise the sum of 10,000*l.* part of a sum of 15,000*l.* and the interest thereon appointed in favour of the said Edward Tyrwhitt Drake by a deed poll dated the 29th day of April 1910 under the hand and seal of the said W. W. Tyrwhitt Drake and to pay the said sum of 10,000*l.* and interest to the said Percy Tyrwhitt Drake and in such manner in all respects as if such sum of 10,000*l.* and interest part of the said larger sum of 15,000*l.* and interest had immediately after the execution of the said deed poll been assigned by the said Edward Tyrwhitt Drake to the said Percy Tyrwhitt Drake absolutely and free from incumbrances as a first charge on the said sum of 15,000*l.*"

The question now arose whether the 10,000*l.* should be paid to Percy Tyrwhitt Drake free of estate duty chargeable on the Deptford Estate, or whether it should bear a rateable proportion thereof.

Eve J. decided that Percy Tyrwhitt Drake should bear a rateable proportion of the duty, and Percy Tyrwhitt Drake appealed from that decision.

The appeal was heard on May 6 and 11, 1925.

Roope Reeve K.C. and *Howard Wright* for the appellant. This is a question which arises as between a portioner and his mortgagee. The 10,000*l.* is to be paid as if it had, immediately after the execution of the deed of appointment, been assigned

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to the appellant absolutely and free from incumbrances as a first charge on the portions sum. That indicates that the assignee was to have a clear sum of 10,000*l.* secured to him by way of mortgage free from any estate duty or other incumbrance, and it was to be a first payment out of the 15,000*l.* The question is really one of construction, and it has never been held that any right of apportionment and contribution to estate duty extends to a mortgagee of a portions charge.

Gover K.C. and *Israel* for the respondent. The question is whether estate duty in respect of this sum is to be borne in the way directed by the Finance Act, 1894, or whether there is a disposition containing an express provision to the contrary within s. 14, sub-s. 1, of the Act.

We do not contend that this is a clause which entitles the appellant to two-thirds of the total portions fund within the principle of *Page* v. *Leapingwell.* (1) The only question is the effect of cl. 29 in the light of the express provisions of the Finance Act, 1894. The appellant is entitled to receive his 10,000*l.* in priority to anything coming to this respondent, but he is not also entitled to a further sum for estate duty.

By s. 9, sub-s. 1, of the Act a rateable part of the estate duty in proportion to the value of any property not passing to the executor as such, is a first charge on the property in respect of which duty is leviable. The executor was not accountable for duty on the Deptford Estate or on the 15,000*l.* portions charge which formed part of that estate.

Under s. 9, sub-s. 1, the duty falls on every part of the property and is a first charge upon it. The trustees of the portions term are accountable under s. 8, sub-s. 4, for the duty on the 15,000*l.*, and they ought to recover a rateable part of that duty in respect of the 10,000*l.* as being a beneficial interest in the larger sum. They are entitled to recover it under s. 14, sub-s. 1, for the appellant is a person "entitled to any sum charged on such property": *In re Countess of Orford* (2); *Berry* v. *Gaukroger* (3); *In re Hacket* (4); *In re*

(1) (1812) 18 Ves. 463.
(2) [1896] 1 Ch. 257.
(3) [1903] 2 Ch. 116.
(4) [1907] 1 Ch. 385.

Hartland (1); *In re Charlesworth's Trusts* (2); *In re Briggs.* (3) In view of the later decisions, *Wade* v. *Wade* (4) is of doubtful authority.

The expression "free from incumbrances" in cl. 29 only means free from any incumbrance existing at that date; it could not mean free from estate duty, which had not then accrued. "The sale of an expectancy 'free from incumbrances' does not throw the Succession Duty on the vendor; . . . . so probably, of a similar sale of a reversion": Stroud's Judicial Dictionary, 2nd ed., pp. 766, 769.

There was no express provision to the contrary in this deed within the meaning of s. 14, sub-s. 1, such as there was in *In re Parker-Jervis* (5); *In re Lord Fitzhardinge* (6); *In re Rayer* (7); *In re Charlesworth's Trusts.* (2)

Two properties passed on the death of the tenant for life —namely, the Deptford Estate and the 15,000*l.* portions fund.

[WARRINGTON L.J. No. Only one property passed, and that was the Deptford Estate. It was subject to a charge for 15,000*l.*, which was part of that estate and not a separate entity.]

If we are right in submitting that it was a separate entity of property, then under s. 14, sub-s. 1, the 10,000*l.* charged thereon would bear a rateable part of the estate duty: *Berry* v. *Gaukroger.* (8) The Deptford Estate passed to Edward for life with remainders over; the 15,000*l.* passed to Edward; and the 10,000*l.* passed to Percy.

[WARRINGTON L.J. The question of what property "passed" on a death was considered by the House of Lords in *Nevill* v. *Inland Revenue Commissioners.* (9)]

Dighton Pollock for the trustees.

Roope Reeve K.C. in reply. All the arguments and cases cited on behalf of the respondent only go to show that the 15,000*l.* was a charge on the inheritance, but the point in this case is not whether the 15,000*l.* is a charge

(1) [1911] 1 Ch. 459.
(2) [1912] 1 Ch. 319.
(3) [1914] 2 Ch. 413.
(4) [1898] 2 Ch. 276.
(5) [1898] 2 Ch. 643.
(6) (1899) 80 L. T. 376.
(7) [1903] 1 Ch. 685.
(8) [1903] 2 Ch. 116.
(9) [1924] A. C. 385.

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on the inheritance, which is admitted, but whether a derivative charge on that reversionary sum so charged on the inheritance is liable to bear a rateable part of the duty payable by that sum. Sect. 14, sub-s. 1, has done its work when it throws a rateable part of the duty on the 15,000*l.* portions charge; it does not go on to throw any part of that duty on derivative dealings with that portions charge. A derivative charge like this is not property passing on the death. *Berry* v. *Gaukroger* (1) has no application at all to such a case as this.

Cur. adv. vult.

1925. May 26. POLLOCK M.R. stated the facts as above set out and continued: Under the Finance Act, 1894, death duties have to be paid on the property passing within the meaning of ss. 1 and 2 of that Act on the death of the father, William Tyrwhitt Drake; duties, the scale of which is enhanced by the aggregation of the estates; and the question to be decided is whether the 10,000*l.* thus given to his uncle by Edward has to bear its portion of such duties.

By s. 1 of the Finance Act, 1894, estate duty is granted upon all property which passes on the death of a person dying after the commencement of the Act; and by s. 9, sub-s. 1, a rateable part of the duty in proportion to the value of any property which does not pass to the executor as such, is made a first charge on the property in respect of which duty is leviable. By s. 8, sub-s. 4, in the case of property passing and where the executor is not accountable for the duty in respect of such property, every person to whom any property so passes for any beneficial interest in possession and "every person in whom the same is vested in possession by alienation or other derivative title shall be accountable for the duty" on the property, and is to deliver an account in respect of it.

It is claimed that s. 14, sub-s. 1, apportions the duty and provides for its recovery in the present case from Percy

(1) [1903] 2 Ch. 116.

Tyrwhitt Drake. Sect. 14, sub-s. 1, is as follows: "In the case of property which does not pass to the executor as such, an amount equal to the proper rateable part of the estate duty may be recovered by the person, who being authorised or required to pay the estate duty in respect of any property has paid such duty, from the person entitled to any sum charged on such property (whether as capital or as an annuity or otherwise), under a disposition not containing any express provision to the contrary."

One point may be cleared away at once. Clause 29 does not contain any "express provision to the contrary": see *In re Langham and Langham Hotel Co.* (1), where it is decided that the above words do not include a future charge which is imposed from an extrinsic source such as arises from the duty that upon a subsequent event becomes payable. An express provision to the contrary is such as arises from the words "free from all taxes and deductions," as in *In re Lord Fitzhardinge.* (2)

But how far does s. 14, sub-s. 1, carry the right to recover the duty paid where, as here, the property does not pass to the executor as such? It enables recovery to be made from a person entitled to the sum charged under the disposition creating the charge. That person is here Edward Tyrwhitt Drake. But does it give a right to recoupment? It is to be observed that the words that are found in s. 8, sub-s. 4, "in whom the same is vested in possession by alienation or other derivative title," are not repeated in s. 14, sub-s. 1.

As Vaughan Williams L.J. said in *Berry* v. *Gaukroger* (3) "the whole scheme of the Finance Act, so far as it relates to property passing on the death of the deceased in respect of which his executor is not responsible for estate duty, is to tax the property itself so passing, and to make the estate duty a first charge" which must be paid ultimately by the persons beneficially entitled in proportion to their shares. But it appears to me that Percy Tyrwhitt Drake

(1) (1890) 60 L. J. (Ch.) 110. (2) 80 L. T. 376.
(3) [1903] 2 Ch. 116, 131.

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does not hold, nor did he become entitled to a charge on the property within s. 14, sub-s. 1. That section provides for recoupment as between two persons—the one who has paid the duty, the other, a person who is entitled to a sum charged on that property in respect of which the first has paid the duty. It does not provide for recoupment from another who takes from and under the person who is entitled to the sum charged on the property. In the present case the uncle became entitled to the sum of 10,000*l.* by assignment from his nephew. True, the origin of the sum assigned to him is indicated, but that does not bring Percy Tyrwhitt Drake within the ambit of s. 14, sub-s. 1, as a person entitled to a sum charged on the property under a disposition creating the charge. His title is derived from a contract and a deed independent of that under which his nephew became entitled to the sum charged by William Tyrwhitt Drake in the nephew's favour on the property.

The point we have to decide falls under s. 14, sub-s. 1, only. It is a question of recoupment as between Edward and Percy Tyrwhitt Drake. We have not to decide whether the defendant, Percy Tyrwhitt Drake, falls within the terms of s. 8, sub-s. 4, above quoted, and can be held to have taken property which passed on the death of William Tyrwhitt Drake for a beneficial interest in possession, or is a person in whom an interest in the property so passing is vested in possession by alienation or other derivative title. There are difficulties in so holding, but it is not necessary upon the present appeal to come to a decision.

As to the cases cited, *Berry* v. *Gaukroger* (1) does not afford authority in the present case. The legacies in that case were held to be property which passed to the legatees for a beneficial interest in possession on the death, and to come within s. 8, sub-s. 4, and not within s. 14, sub-s. 1.

The appeal must be allowed and a declaration made that the sum of 10,000*l.* is payable to the defendant Percy Tyrwhitt Drake as a clear sum free from any part of the duties payable in respect of the said portions.

(1) [1903] 2 Ch. 116.

WARRINGTON L.J. [after stating the facts above set out :] The question is whether the 10,000*l.* should be paid to Percy Tyrwhitt Drake free of the estate duty chargeable on the Deptford Estate or should bear a rateable proportion thereof. The questions raised in argument were two : First, whether under the Finance Act, 1894, a proportionate part of the estate duty was by statute made payable out of the 10,000*l.*, and secondly, if not, whether according to the true construction of the deed of March 21, 1921, the 10,000*l.* was or was not to be paid free of duty.

In support of the declaration made by Eve J. counsel relied chiefly on the provisions of the statute and in my opinion rightly, for I think that it is plain on the construction of the deed that the 10,000*l.* was intended to be paid as a net sum out of the 15,000*l.*, and not to bear any part of the charges statutory or otherwise which might be cast upon the 15,000*l.* The real question is whether a rateable proportion of the estate duty is by statute cast upon the 10,000*l.* The answer to this question turns upon the true construction and effect of s. 14, sub-s. 1, of the Finance Act, 1894.

In my opinion this section, while it no doubt provides for the recovery from the person entitled to the 15,000*l.* charged on the Deptford Estate of a rateable part of the duty in respect of that estate, does not affect the rights of the persons entitled amongst themselves to various parts of such sum, but leaves those rights to be determined by their contractual arrangements.

I can state my view I think very shortly : The " property " referred to in the section is that property which either passes on the death (s. 1), or is to be deemed to be included in such property (s. 2). The sum of 15,000*l.* is not property which passes on the death of W. W. Tyrwhitt Drake, nor is it within the description in s. 2 of property which is to be deemed to so pass. The sum of 15,000*l.* is made subject to duty, not as property passing on the death but as a sum charged on such property—namely, in this case the Deptford Estate. The 10,000*l.*, if it can be treated as a charge at all, is a charge not on the Deptford Estate but on the 15,000*l.* The section

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makes no provision for the case in which several persons are entitled to various interests in the "sum charged," and I think the necessary inference is that the question whether, and if so how, the "rateable part" recovered under the section is in such a case to be apportioned amongst such persons, is left to the contractual arrangements affecting their various interests. This view of the limited effect of the section is strongly confirmed by the fact that the "disposition" referred to in the closing words is that under which the sum is charged—namely, the instrument creating the charge. Effect may be given to a provision in such an instrument expressly excluding the effect of the section, but if the section extends to the persons entitled amongst themselves to various interests in the charge, no exception at all is made to the generality of the first part of the section, a result which seems to me an impossible one to attribute to the Legislature.

Great reliance was placed by the respondent on *Berry* v. *Gaukroger* (1), but in that case the Court of Appeal held that the legacies there in question were themselves part of the property passing on the death of the deceased—namely, the fund arising from the sale of realty and not merely charged on such property, and that the several legatees were persons to whom the property so passed for a beneficial interest, and were therefore directly accountable under s. 8, sub-s. 4, of the Act. As the legatees were not persons "entitled to a charge" within the words of s. 14, that section had no application.

In the present case it is not necessary to decide whether or not Edward Tyrwhitt Drake as owner of the charge is under s. 8, sub-s. 4, accountable to the revenue for any and what part of the estate duty, or whether under that section Percy Tyrwhitt Drake can be regarded as a person in whom an interest in property passing on the death is vested by alienation or other derivative title, and therefore also accountable for duty. For myself I am not satisfied that either of these questions should be answered in the affirmative, but as I am of opinion that if they were both so answered

(1) [1903] 2 Ch. 116.

the conclusion I have come to on s. 14 would still be the same, I express no definite opinion and leave the matter open.

I am of opinion therefore that the rights of Edward and Percy respectively in reference to the division of the 15,000*l.* ought to be determined entirely by the contract, and that under this, as I have already said, Percy is entitled to be paid the 10,000*l.* without deduction for estate duty.

The appeal ought to be allowed and the declaration varied according to the view above expressed.

SARGANT L.J. This appeal raises the question whether on the true construction of cl. 29 of the indenture of settlement of March 21, 1921, mentioned in the heading of the originating summons and herein called the 1921 settlement, the sum of 10,000*l.* part of a portions sum of 15,000*l.* raisable under a term of 1000 years out of certain hereditaments (hereinafter referred to as "the Deptford Estate"), is payable to the defendant Percival Tyrwhitt Drake (hereinafter called Percy Drake) subject to, or free from, a proportion of the estate duty payable on the said portions sum of 15,000*l.* on the occasion of the previous death on July 29, 1919, of the late tenant for life, William Wykeham Tyrwhitt Drake (hereinafter called William Drake). The limitations of the Deptford Estate apart from the 1921 settlement and the contents of that settlement, and particularly of cl. 29 thereof, have been sufficiently set out in the judgments just delivered and need not be repeated by me.

On the mere language of cl. 29 itself there would seem to be little, if any, difficulty in answering this question. The fixed and definite sum of 10,000*l.* is to be raised and paid to Percy Drake; and, although it is described as part of the portions sum of 15,000*l.*, there is no statement or suggestion that it forms an aliquot or fractional share, such as two-thirds, of that larger sum or is liable to suffer a corresponding, or pro rata, loss, should that larger sum abate or be diminished for any reason. And the final directions in the clause that the 10,000*l.* is to be paid as if it had immediately after the execution of the deed poll appointing it—that is on April 29,

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1910—been assigned by the respondent Edward Thomas Tyrwhitt Drake (hereinafter called Edward Drake) to Percy Drake, absolutely and free from incumbrances as a first charge on the said sum of 15,000*l.*, rather emphasize than diminish the reasons for considering the 10,000*l.* as a fixed sum, independent of the precise amount of the larger fund out of which it was payable. It would seem to be quite immaterial for this purpose whether the 15,000*l.* was to be regarded as diminished by an accrued liability for estate duty, on William Drake's death, as was the case at the date of the 1921 settlement, or was to be regarded as merely liable to be diminished by the subsequent accruer of a claim for estate duty on that death, as would have been the case had the assignment of the 10,000*l.* taken place on April 29, 1910.

Indeed this view of the matter has not been contested by counsel for the respondent. Their argument, which succeeded before the learned judge, was based solely on the special provisions of the Finance Act, 1894, and particularly on those contained in s. 9, sub-s. 1, s. 14, sub-s. 1, and s. 8, sub-s. 4, of that Act, and may be summarized as follows—namely, the portions sum of 15,000*l.* was included in and part of the Deptford Estate which passed on the death of William Drake, and his executor was not accountable for duty on that estate or on the 15,000*l.* as part of it; this being so, under s. 9, sub-s. 1, the estate duty on the 15,000*l.* is thrown rateably on the 10,000*l.* as being a beneficial interest pro tanto in the 15,000*l.*; and the trustees of the term of 1000 years, who are liable to pay the duty on the 15,000*l.* under s. 8, sub-s. 4, can and ought to recover this pro rata proportion from Percy Drake as the beneficial owner of the 10,000*l.*; and further, inasmuch as the 10,000*l.* is expressed to be a charge on the 15,000*l.* and the assignment in cl. 29 contains no express disposition to the contrary, Edward Drake when called on to bear the duty on the whole 15,000*l.* is entitled under s. 14, sub-s. 1, to recover a proper rateable proportion of the duty from Percy Drake as the person entitled to the charge of 10,000*l.* on the 15,000*l.* Further, certain cases, including in particular that

of *Berry* v. *Gaukroger* (1), were relied on in support of this general view of s. 8, sub-s. 4, and s. 14, sub-s. 1; and a number of other cases, of which *In re Charlesworth's Trusts* (2) may be taken as an example, were relied on as establishing that, assuming the correctness of this general view, the words used in cl. 29 were not sufficient to amount to an express disposition to the contrary within the language of s. 14, sub-s. 1.

The foregoing argument was very forcibly urged by counsel for the respondents and was attractive from some points of view. But it does not satisfy a closer examination. In the first place, as Warrington L.J. pointed out in the course of the case, though what passed on the death of William Drake was the source of the portions sum of 15,000*l.*, there was no passing of that sum as a separate item or asset. That which passed was the Deptford Estate itself, and the effect of s. 9, sub-s. 1, is to apportion the estate duty rateably between the several hereditaments constituting that estate; not to split the estate up notionally into the 15,000*l.* charge, and the equity of redemption subject to that charge, and to make an apportionment as between these two notional items. Briefly put, the splitting up is lateral, not vertical. Further, the effect of s. 14, sub-s. 1, is that the person authorized or required to pay the estate duty on the property, that is the Deptford Estate, is entitled to recover the proper rateable proportion of that duty from the person or persons entitled to the charge of 15,000*l.* on that estate, that is from the trustees of the term of 1000 years, so that the sum of 15,000*l.* available in their hands for their beneficiary Edward Drake is diminished to that extent. When that has been done the force of s. 14, sub-s. 1, is apparently exhausted, and it has no further operation to effect a further statutory apportionment or right to reimbursement as between Edward Drake and any one taking under him by sub-charge, partial alienation, or other derivative title. The concluding words of that sub-section —namely, " under a disposition not containing any express

(1) [1903] 2 Ch. 116. (2) [1912] 1 Ch. 319.

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provision to the contrary," refer, in my judgment, not to a disposition creating a sub-title or derivative title by way of partial alienation or otherwise, but to the original disposition under which the primary charge is created, and would have been appropriate and have operated in this case to free the original portion sum of 15,000*l.* from any liability to contribute, had the document creating the 15,000*l.* charge contained a sufficient express provision to that effect.

All the cases cited for the respondent in which a question arose as to whether a disposition did or did not contain a sufficiently express provision to the contrary, such as *In re Rayer* (1), *In re Lord Fitzhardinge* (2), and *In re Charlesworth's Trusts* (3), were cases in which the disposition was one originally creating a charge, and had nothing to do with a sub-disposition creating a derivative title. Mr. Roope Reeve was I think fully justified in saying that the statutory liability to apportionment and reimbursement had never been held to extend beyond the original charge.

Further, when the case of *Berry* v. *Gaukroger* (4) is carefully examined, it will be found not to conflict in any way with the above view of the statute, and indeed to have little if any bearing on the present case. There, the property passing on the death was not land as here, but a fund arising from the sale of real estate and settled by a will made many years previously; and the person on whose death the property passed was the annuitant secured by the income of that fund and of another fund mixed with it which was protected from any claim to duty for other reasons. In that case a portion of the fund liable to duty—namely, sums payable for legacies, went one way, and the rest of the fund went another way; and the case fell directly within the provisions of s. 8, sub-s. 4, and s. 9, sub-s. 1, if, as the Court of Appeal thought, the first portion of the fund was not charged on the second portion, while, if it had been so charged, the case would have fallen within the provisions of s. 14, sub-s. 1. The case had

(1) [1903] 1 Ch. 685.
(2) 80 L. T. 376.
(3) [1912] 1 Ch. 319.
(4) [1903] 2 Ch. 116.

nothing to do with a case like the present, where there is a sub-charge on a portions sum which is itself charged on the property passing on the death—namely, certain lands and hereditaments.

Again, if it is contended that the 15,000*l.* portions sum, as constituting a beneficial interest in the Deptford Estate, is in an analogous position to the legacies which in *Berry* v. *Gaukroger* (1) were held to constitute a beneficial interest in the settled fund, and so is liable to duty under s. 8, sub-s. 4, the answer is substantially the same as to the claim under s. 14, sub-s. 1. For what is sought is, not merely to render the 15,000*l.* itself liable, but to carry on the effect of s. 8, sub-s. 4, a step further, and to make every sub-interest in the 15,000*l.* itself accountable for an apportioned amount of the estate duty which has by the terms of s. 8, sub-s. 4, itself been thrown on the 15,000*l.* It is as if the decision in *Berry* v. *Gaukroger* (1) had not only cast duty on the legacies in question there but had gone on to cast an apportioned part of such duty on sub-interests created by the legatees in those legacies. The language of s. 8, sub-s. 4, does not, in my judgment, justify any such further step; nor is *Berry* v. *Gaukroger* (1) any authority for taking it. And to do so would, in my view, be to introduce unnecessary and unwarranted complications into the scheme of the Act.

In my judgment, therefore, there is nothing in the Finance Act, 1894, to create any special relationship between Edward Drake, as the beneficial owner of the 15,000*l.*, and Percy Drake, as the assignee of the 10,000*l.*, or to do more than diminish the capital value of the 15,000*l.* itself. The question between them must be decided on the language of cl. 29 of the 1921 settlement alone; and Percy Drake takes his 10,000*l.* clear.

Solicitors for the appellant: *Hunters.*
Solicitors for the respondent: *Oliver Richards & Parker.*
Solicitors for the trustees: *Bircham & Co.*

(1) [1903] 2 Ch. 116.

R. M.

EVE J.
1926
March 12, 18.

In re EGERTON SETTLED ESTATES.

[1926. E. 224.]

Settled Estate—Tenant for Life in Possession—General Power of Appointment — Prior Rentcharges — Estate Owner in fee simple — Power to create legal Mortgage — Form of Order—Settled Land Act, 1925 (15 *Geo.* 5, *c.* 18), *ss.* 16, *sub-s.* 1, (*iii.*), 18.

Where the estate owner of a settled estate having a general power of appointment over the settled hereditament requires to raise money for his own use and benefit, he is entitled, under s. 16 of the Settled Land Act, 1925, to demise the settled land by way of legal mortgage to a mortgagee, at such mortgagee's request in writing, in order to secure the moneys advanced; such mortgage being expressed to take effect subject to any prior equitable charges subsisting under the settlement.

ADJOURNED SUMMONS.

By an indenture of settlement dated November 8, 1895, and certain deeds poll, various freehold hereditaments in the county of Lancaster, together with other hereditaments of very large extent and value, were limited to the use of the then Lord Egerton for life, and after his death to the use of trustees for a term of 1000 years upon certain trusts which had been satisfied, and subject thereto to the use that the Duchess of Buckingham and Chandos (wife of the then Lord Egerton) should receive during her life the yearly rentcharge of 2000*l.*, and subject thereto to the use that the Countess of Albemarle might receive during her life the yearly rentcharge of 3000*l.*, and subject thereto to a jointure rentcharge of 4500*l.* a year to Lady Anna Louisa Egerton for life; and subject to these rentcharges the estates were limited to such uses as the present Lord Egerton might by deed generally appoint, and in default of appointment to the use of the present Lord Egerton as tenant for life in possession. The present Lord Egerton succeeded to the title and the estates in September, 1920, as tenant for life in possession. Towards the end of 1925 a loan was being negotiated on behalf of Lord Egerton with the Admiralty (the Greenwich Hospital Trustees) for a sum of between 100,000*l.* and 120,000*l.* This sum was required for

Lord Egerton's own purposes, and was to be secured on part of the settled estate consisting of perpetual chief rents issuing out of freehold hereditaments in the county of Lancaster. If this mortgage could have been completed before January 1, 1926, it would have been carried out by an appointment by Lord Egerton under his general power of appointment to the mortgagees in fee simple, subject to the three annuities. On January 27, 1926, a vesting deed under the powers of the Settled Land Act, 1925, s. 37, was made between Montague Ellis and Robert Henry Granville Tatton (the trustees of the settlement) of the one part and Lord Egerton of the other part (supplemental to the original settlement and two deeds poll), whereby the trustees declared that all the hereditaments subject to the subsisting limitations or trusts of the indenture of settlement, and the deeds poll, were vested in Lord Egerton in fee simple. The Admiralty required to have a legal mortgage to secure the money proposed to be advanced, but had been advised that Lord Egerton had now no power under the Settled Land Act, 1925, to create such legal mortgage. An originating summons was accordingly taken out by Lord Egerton to have this question determined.

Gover K.C. and *A. L. Ellis* for Lord Egerton. Subject to the three permanent overriding rentcharges or annuities, Lord Egerton has a general power of appointment without any restriction whatever, and by virtue of the vesting deed of January 27, 1926, he is now estate owner in fee within the terms of the Law of Property Act, 1925. The Admiralty require a legal mortgage to secure the advance of some 120,000*l.* And as the estate owner requires that sum to be raised for his own purposes it comes literally within the provisions of s. 16, sub-s. 1, para. (iii.), of the Settled Land Act, 1925. (1) It is suggested on the other side

(1) Sect. 16, sub-s. 1, of the Settled Land Act, 1925, provides: "All equitable interests and powers in or over settled land (whether created before or after the date of any vesting instrument affecting the legal estate) shall be enforceable against the estate owner in

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that s. 18 is the section which applies here, and that only an equitable mortgage can be given according to the terms of para. (i.) of sub-s. 1 of s. 16. But it would indeed be strange if the owner of such a large estate as the Egerton settled estates, who required money for his own use and benefit, could not create a legal mortgage which might have been done before the Settled Land Act, 1925, came into force. It would be absurd if the estate owner had to give a written notice to himself to create the legal mortgage. The request must be made by the lenders, the mortgagees, in this case. In other cases where money has to be raised for other purposes connected with the settled estates the request might come from the trustees of the settlement, and the moneys advanced would then be paid to them. If there is any doubt whether any and what legal estate ought to be transferred or created, an application to the Court may be made for directions, under s. 16, sub-s. (6), that is the form which the present application takes; s. 93 also applies.

In Key and Elphinstone's Precedents in Conveyancing, 12th ed., vol. ii., part 1, pp. 99–100, there is a precedent of a mortgage of legal estates by a tenant for life as trustee and in exercise of a power under a strict settlement subject

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whom the settled land is vested, ... in manner following (that is to say):

"(i.) The estate owner shall stand possessed of the settled land and the income thereof upon such trusts and subject to such powers and provisions as may be requisite for giving effect to the equitable interests and powers affecting the settled land or the income thereof of which he has notice according to their respective priorities;

"(iii.) Where (*a*) any principal sum is required to be raised on the security of the settled land, by virtue of any trust, or by reason of the exercise of an equitable power affecting the settled land, or by any person or persons who under the settlement is or are entitled or together entitled to or has or have a general power of appointment over the settled land, whether subject to any equitable charges or powers of charging subsisting under the settlement or not; or (*b*) the settled land is subject to any equitable charge for securing money actually raised and affecting the whole estate the subject of the settlement;

the estate owner shall be bound, if so requested in writing, to create such legal estate or charge by way of legal mortgage as may be required for raising the money or giving legal effect to the equitable charge."

to prior charges. That also is a precedent where a vesting deed under s. 37 of the Settled Land Act, 1925, had been made, and it is in the form of a demise for a term of years, or a charge by way of legal mortgage.

Vaisey K.C. and *P. M. Walters* for the trustees of the settlement. Sect. 16 of the Settled Land Act, 1925, is not available for carrying out that which the mortgagees require. Sect. 18 is the key section which governs this case; it prohibits any dealing by the tenant for life, except as under the provisions of that section. It contains restrictions on the disposition of settled land where the trustees have not been discharged. The estate owner here being also a trustee of the settled land would be in a difficulty between his interest and his duty. That would arise under s. 16, sub-s. 1, para. (i.). The object is to prevent the trusts of the settlement from coming into the title in the case of a sale. The vesting deed would be the only deed necessary to be seen. Where money is required for the purposes of the settlement it must clearly be made by equitable charge. A request in writing is necessary. Sect. 16 must be scrutinized carefully if it is sought to apply it to make an exception to the general restriction. The owners of the rentcharges would be absolutely at the mercy of the estate owner, who is also the trustee, and dependent upon his bona fides. The policy of the Act is not to lift the curtain by giving notice of these equitable charges.

Cur. adv. vult.

March 18. EVE J. delivered the following considered judgment. On January 1, 1926, the Egerton Settled Estates, of which the hereditaments and premises to which this summons relates form part, and which I shall hereafter refer to as "the settled land," stood limited subject to certain overriding annuities to such uses as Lord Egerton should by deed appoint, and subject thereto to the use of Lord Egerton for life with remainders over, and on the 27th of the same month the principal vesting deed under s. 37 of the Settled Land Act, 1925, and s. 1, sub-s. 2, of para. 1 of the second schedule thereto was duly executed.

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Lord Egerton is desirous of raising a sum of money for his own purposes on the security of the settled land, and the question is whether he can create such legal estate or charge by way of legal mortgage as is required by the proposed mortgagees before they will consent to advance the money. By para. iii. of sub-s. 1 of s. 16 of the Settled Land Act it is enacted—I am only reading the words which are clearly applicable to the case in point—as follows: "Where any principal money is required to be raised on the security of the settled land by any person who under the settlement has a general power of appointment over the settled land the estate owner shall be bound, if so requested in writing, to create such legal estate or charge by way of legal mortgage as may be required for raising the money." That language appears to me to be entirely appropriate to the circumstances here subsisting. Lord Egerton has under the settlement a general power of appointment over the settled land—he requires a principal sum to be raised on the security of the settled land—and those who are prepared to advance the money require a legal estate to be created by way of security. If the transaction is to be completed Lord Egerton must, on the written request of the mortgagees, create the required legal estate. Why should not effect be given to this language? It is said that so to do might put the estate owner in a position of difficulty, in that as trustee of the settled land upon such trusts as may be requisite for giving effect to the equitable interests and powers affecting the settled land (s. 16, sub-s. 1, para. i.) it will be incumbent upon him under sub-s. 2 of the same section to see that the mortgage is made expressly subject to all the equitable interests and powers subsisting under the settlement and having priority to his interests or powers, and that this obligation may create a position in which his duty and interest may conflict. This may be so to some extent, but even so it hardly seems a sufficient reason for eliminating him of all persons from the class of individuals entitled to have a legal estate created to secure principal sums required to be raised on the security of the settled land. Nor do I think the transaction involves the absurdity of the

estate owner serving a written request on himself to create the legal mortgage. The individual by or on behalf of whom the money is required to be raised is not the same person as the one who requires the creation of the legal estate to secure the advance, and in cases where the estate owner is borrowing for his own purposes the request in writing must in my opinion be regarded as one coming from the lender. In other cases, such for example as one of money being required to be raised by virtue of any trust, the request, it seems to me, might be made by the trustees or the beneficiaries or the lender.

The construction of s. 16 is not without difficulty—for example, what provision in para. iii. of sub-s. 1 calls for the inclusion of sub-s. 3—but the conclusion I have arrived at is that the words I have read from para. iii. do expressly provide for the creation of a legal mortgage by an estate owner who, under the settlement, has a general power of appointment over the settled land.

The form of order as settled by minutes was as follows: "Declare that the applicant having under the above mentioned settlement a general power of appointment over the settled land is, for the purpose of securing moneys to be advanced to him for his own use and benefit, entitled under s. 16 of the Settled Land Act, 1925, to demise the settled land by way of legal mortgage to a mortgagee, at such mortgagee's request in writing, for securing the moneys so advanced as aforesaid, such mortgage being expressed to take effect subject to any equitable charges or powers of charging subsisting under the said settlement which have priority to the applicant's said power of appointment."

Solicitors: *Ellis, Peirs & Co.*

G. M.

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1926

March 18.

In re FREWEN.

[1926. F. 345.]

Settled Land—Limited Owners having Powers of Tenant for Life—Person entitled to Income of Land, subject to Trust for Accumulation of Income—Trustees of Settlement having Powers of Tenant for Life—Settled Land Act, 1925 (15 *Geo.* 5, *c.* 18), *s.* 20, *sub-s.* 1 (*viii.*), *s.* 23.

Under indentures of settlement and appointment made in 1906 and 1918 respectively, land became settled upon trust to pay two-third parts of the net income thereof to T. F. during his life, and the other one-third part of such net income was directed to be held upon the trusts and subject to the powers upon and subject to which capital money arising under the Settled Land Acts from freehold hereditaments forming part of the settled estate would be held; that was to say, in trust, after the death of T. F. for his first and other sons in tail. During the life of T. F. all the powers conferred by the Settled Land Acts on a tenant for life in possession of settled land were declared to be exercisable by the trustees in relation to the settled estate:—

Held, that T. F. was not entitled to the income of the settled estate during his life subject to a trust for accumulation of income within s. 20, sub-s. 1 (viii.), of the Settled Land Act, 1925; and, accordingly, that he had not the powers of a tenant for life, but that the trustees of the settlement had such powers by virtue of the terms of the settlement and s. 23, sub-s. 1, of that Act.

ADJOURNED SUMMONS.

By an indenture (hereinafter called "the Settlement"), dated May 1, 1906, and made between Anne Mary Frewen of the first part Edward Frewen her husband of the second part Thomas Frewen their son of the third part and trustees thereof of the fourth part divers freehold and copyhold manors lands and hereditaments were assured to the trustees their heirs and assigns upon such trusts and subject to such provisions as the said parties of the first three parts jointly should by deed appoint; and in default of and subject to any such appointment and subject to certain trusts in favour of such last mentioned parties all of which trusts have ceased in trust for Thomas Frewen during his life and after his death in trust for his first and other sons successively in remainder one after the other according to their respective seniorities and the heirs male of their respective bodies with divers remainders over.

By an indenture dated June 19, 1918, and made between Anne M. Frewen, Edward Frewen and Thomas Frewen of the one part and the persons who were then the trustees of the settlement of the other part Anne M. Frewen, Edward Frewen and Thomas Frewen in exercise of the power given to them by the settlement jointly appointed all the lands and hereditaments and all the moneys and investments and other property real and personal subject to the limitations and trusts of the settlement should, subject to the joint power of appointment vested in the three appointors by the settlement (which power was thereby confirmed) and to the trusts declared by the settlement in favour of Anne M. Frewen and Edward Frewen, which ceased by their deaths, be held upon trust that the trustees should after the death of Edward Frewen enter into possession or receipt of the income of the settled estate and should during the remainder of the life of Thomas Frewen continue in such possession and receipt and manage the settled land as if the trustees were absolute owners thereof, and should hold the net income of the settled estate (which expression included as well as the lands and hereditaments, also capital money and investments for the time being subject to the settlement) after payment of management expenses, upon trust to pay two-third parts of such net income or the annual sum of 500*l.* whichever should be the greater to Thomas Frewen during his life, unless and until some act or event should have been done or happened or should be done or should happen whereby the two-third parts of the said income or annual sum of 500*l.* as the case might be or any part thereof respectively would if belonging absolutely to him have become vested in or charged in favour of some other person or persons or a corporation. Then followed discretionary trusts in favour of Thomas Frewen, his wife and children and other relatives upon the failure or determination during the life of Thomas Frewen of the trust in his favour: and the trustees were directed to hold the other one-third part of the said income or the balance thereof remaining after the payment of the said annual sum of 500*l.*, as the case might be, upon the trusts and subject

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to the powers and provisions upon and subject to which capital money arising under the Settled Land Acts from freehold hereditaments forming part of the settled land would be held. And it was provided that during the life of Thomas Frewen, if he should survive Edward Frewen, all the powers which by the Settled Land Acts were conferred upon a tenant for life in possession of settled land should be exercisable by the trustees over or in relation to the settled estate.

Edward Frewen died on January 13, 1919, and Anne Mary Frewen died on May 11, 1922, since which date the trustees had been in possession of the settled estate and dealt with the income thereof in accordance with the trusts under the deed of appointment. Two-thirds of the net income of the settled estate exceeded 500*l.*, and, therefore, the annual sum of 500*l.* did not become payable.

On November 16, 1925, the trustees entered into a contract for the sale of the settled estate, and the purchaser having questioned their title, this summons was accordingly taken out by the trustees under s. 93 of the Settled Land Act, 1925, to have it determined whether the respondent Thomas Frewen was tenant for life or was a person having the powers of a tenant for life under that Act of the settled estate or whether the trustees had the powers of a tenant for life under the Act or whether they held the settled estate upon the statutory trusts.

John W. F. Beaumont for the trustees. Thomas Frewen is not tenant for life under s. 19 of the Settled Land Act, 1925, because he is not entitled to possession or to the rents and profits of the settled land, nor is he a person having the powers of a tenant for life under any of the clauses of s. 20, sub-s. 1, of the Act. He is not entitled to the income of land under a trust for payment thereof to him during his life within the meaning of cl. viii. of s. 20, sub-s. 1, of the Act (1),

(1) Sect. 20, sub-s. 1: "Each of the following persons being of full age shall, when his estate or interest is in possession, have the powers of a tenant for life under this Act, (namely):—

(viii.) A person entitled to the income of land under a trust or

for he is according to the frame of the trust only to be paid two-thirds of the income. The proper answer to the question asked by the summons must turn upon the particular wording of the trust, which according to the deed of appointment in this case is to pay two-third parts of the income to the respondent, Thomas Frewen. In the absence of a tenant for life or of a person having the powers of a tenant for life, the trustees of the settlement have, under s. 23 of the Act (1), the powers of a tenant for life.

Hugh Gamon for the respondent. The respondent is entitled to the income of the land subject to a trust for accumulation of income within the meaning of s. 20, sub-s. 1 (viii.), of the Act. The Court will look at the substance of the matter, and, if there is a person (as there is in this case) entitled to all the available income, he has the powers of a tenant for life under cl. viii. of that sub-section. A trust for accumulation does not prevent the respondent from being a person entitled to the income of the settled land. The question depends not upon whether he actually receives any income, but whether he is entitled to receive income, if there is any for him to receive : *In re Jones* (2) and *In re Clitheroe Estate.* (3)

LAWRENCE J. This summons raises the question whether the respondent Thomas Frewen is entitled to exercise the powers of a tenant for life under s. 20, sub-s. 1 (viii.), of the Settled Land Act, 1925, or whether the trustees of the settlement are the persons to exercise such powers. [His Lordship

direction for payment thereof to him during his own or any other life, whether or not subject to expenses of management or to a trust for accumulation of income for any purpose, or until sale of the land, or until forfeiture, cesser or determination by any means of his interest therein, unless the land is subject to an immediate binding trust for sale."

(1) Sect. 23, sub-s. 1 : "Where under a settlement there is no tenant for life nor, independently of this section, a person having by virtue of this Act the powers of a tenant for life, then

(*a*) any person of full age on whom such powers are by the settlement expressed to be conferred; and

(*b*) in any other case, the trustees of the settlement;

shall have the powers of a tenant for life under this Act."

(2) (1884) 26 Ch. D. 736.

(3) (1885) 31 Ch. D. 135.

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then stated the material trusts of the settlement and subsequent deed of appointment and the subsequent deaths of Edward Frewen and Ann Mary Frewen and continued :] In these circumstances it is not suggested that Thomas Frewen is tenant for life of the settled land under s. 19 of the Settled Land Act, 1925, as he is not in possession of the settled land within the meaning of the Act, but Mr. Gamon has forcibly contended that, as the result of the settlement and appointment and in the events which have happened, Thomas Frewen is entitled to the income of the settled land under a trust for the payment thereof to him during his life, subject to a trust for accumulation of income and, therefore, has the powers of a tenant for life within s. 20, sub-s. 1 (viii.), of the Settled Land Act, 1925. It is no doubt true to say that in substance Thomas Frewen is in the same position as he would have been, had the whole of the income of the settled land been made payable to him during his life, subject only to an overriding trust to accumulate part of such income ; but, in my opinion, the Court is not at liberty in a case like the present to ignore the form of the trust. Here there is no overriding trust for accumulation : Thomas Frewen is given a definite portion of the income, while the remaining portion is directed to be held and dealt with as capital money arising under the Settled Land Acts. In my judgment, there is a substantial distinction between a case where a person is entitled to the whole income of settled land subject to an overriding trust for accumulation of income and a case where a person is entitled only to a certain portion of the income and the remainder of the income is to be held and dealt with as capital money. In the latter case it could not, in my opinion, properly be said that the person was entitled to the whole of the income of the settled land subject to a trust for the accumulation of income, as he never was or could become entitled to that portion of the income which was directed to be held as capital. It is obvious that the settlement was framed with the express object of preventing Thomas Frewen from being or having the powers of a tenant for life, which powers were expressly conferred upon the trustees of the settlement.

In the result, I hold that Thomas Frewen is not a person having the powers of a tenant for life under the Settled Land Act, 1925, and that the applicants, as the trustees of the settlement, are the persons having those powers.

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Solicitors for all parties: *Collisson, Prichard & Barnes.*

H. C. H.

In re LANG PROPELLER, LIMITED.

EVE J. 1926 *March* 25, 31.

[00358 of 1925.]

Company—Mortgage of Property and Assets—Winding Up—Interest paid to Mortgagee—Payment less Tax—Crown's Right as Creditor to Tax so deducted—Preferential or pari passu—"Assessed tax"—Whether "assessed" on Company—Deductions whether Moneys in Hands of Company or impressed with a fiduciary Character—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *All Schedules Rules, rr.* 19, 21—*Companies (Consolidation) Act,* 1908 (8 *Edw.* 7, *c.* 69), *s.* 209, *sub-ss.* 1 (*a*), 2, 3 *and* 4.

A company, having mortgaged all its property and assets, subsequently passed a resolution for voluntary winding up. Between the date of the mortgage and the commencement of the winding up the company made no profits, but paid three several sums by way of interest on the mortgage less income tax.

The company never paid over or accounted for such deductions of tax to the Inland Revenue Commissioners, and such deductions were in fact debts due to the Crown at the date of the winding up.

The question having arisen whether the Crown was entitled to such deductions in priority to all other creditors of the company or pari passu with other creditors other than those who were preferential:—

Held, that inasmuch as such deductions could not be said to answer the description of a tax "assessed" on the company within s. 209 of the Companies (Consolidation) Act, 1908, the Crown could not be treated as having any preferential rights over other creditors in respect thereof, and there was nothing in the language of the section giving any priority to the debt. Further, that such deductions were never moneys in the hands of the mortgagor company impressed with a fiduciary character, and capable of being followed and recovered as such; no sum ever existed in a tangible form, and the transaction was merely a payment to the mortgagee of the interest less tax.

ORIGINATING SUMMONS.

Lang Propeller, Ld. (hereinafter called "the company"), was registered on October 1, 1913, under the Companies (Consolidation Act, 1908, as a company, having for one of

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its objects the manufacture of propellers for aeroplanes. During the war it also manufactured aeroplane parts generally, but after the war was over it discontinued this kind of business and carried on other business within its memorandum of association, such as the manufacture of furniture and motor car bodies.

On December 10, 1920, the company by deed mortgaged its freehold works situate at Weybridge, Surrey, together with all the plant and machinery affixed thereto, to one Reuben Glikstein, to secure an advance of 30,000*l.* with interest thereon at 8 per cent. per annum, payable quarterly. The company having failed to pay the interest due on September 10, 1923, the mortgagee in exercise of the powers given him by the mortgage deed entered into possession and sold the property for a sum which did not cover his principal, interest and costs.

On November 8, 1923, a resolution was passed for the voluntary winding up of the company. Between the date of the mortgage and the commencement of the winding up the company made no profits. It had, however, paid interest on the mortgage for the years 1921–22, 1922–23 and for part of the year 1923–24. When paying this interest to the mortgagee the company, pursuant to the Income Tax Act, 1918, All Schedules Rules, r. 21, sub-r. 1 (1), deducted

(1) Income Tax Act, 1918, All Schedules Rules, r. 21 :—

"(1.) Upon payment of any interest of money, annuity, or other annual payment charged with tax under Schedule D, or of any royalty or other sum paid in respect of the user of a patent, not payable, or not wholly payable out of profits or gains brought into charge, the person by or through whom any such payment is made shall deduct thereout a sum representing the amount of the tax thereon at the rate of tax in force at the time of the payment.

(2.) Any such person shall forthwith render an account to the Commissioners of Inland Revenue of the amount so deducted, or of the amount deducted out of so much of the interest, annuity, annual payment, royalty, or other sum respectively, as is not paid out of profits or gains brought into charge, as the case may be, and every such amount shall be a debt from him to the Crown and shall be recoverable as such; and the provisions contained in s. 2 of the Stamp Duties Management Act, 1891, in relation to money in the hands of any person for stamp duty, shall apply to money deducted by any such person in respect of tax."

thereout a sum representing the amount of the tax thereon under Sch. D, at the rate of tax in force at the time of the payment. Thus from the 2400*l.* payable in the year 1921–22, when the rate of tax was 6*s.* in the £, the company deducted 720*l.*, less a sum of 91*l.* 3*s.* 6*d.*, being tax assessed on the company under Schs. A and B, leaving a balance of 628*l.* 16*s.* 6*d.* This deduction was allowed the company on account of its carrying on its business at a loss.

In 1922–23, when the rate was 5*s.* in the £, 610*l.* 6*s.* 1*d.* was deducted, less 73*l.* 7*s.* 10*d.*, leaving a balance of 536*l.* 18*s.* 3*d.*, and in 1923–24, when only one quarter's interest was paid, 131*l.* 0*s.* 6*d.*, there being no assessments under Schs. A and B for that period. Every payment of interest by the company to the mortgagee was accompanied by a covering letter stating the amount of interest paid by cheque, less the tax at the rate for the time being in force.

The company never accounted to the Inland Revenue Commissioners for any of these three several sums so deducted pursuant to sub-r. 2 of r. 21 of the All Schedules Rules of the Income Tax Act, 1918; and at the commencement of the winding up they remained debts due to the Crown. The liquidator informed the Inland Revenue authorities of the state of the company's affairs, and the question arose whether the Crown was a preferential creditor for the amount of the tax so deducted and not accounted for, within s. 209 of the Companies (Consolidation) Act, 1908. (1)

(1) Companies (Consolidation) Act, 1908, s. 209:—

"(1.) In a winding up there shall be paid in priority to all other debts: (*a*) All parochial or other local rates due from the company at the date hereinafter mentioned, and having become due and payable within twelve months next before that date, and all assessed taxes, land tax, property or income tax assessed on the company up to the 5th day of April next before that date, and not exceeding in the whole one year's assessment.

. . . . (2.) The foregoing debts shall: (*a*) Rank equally among themselves and be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions.

. . . . (3.) Subject to the retention of such sums as may be necessary for the costs and expenses of the winding up, the foregoing debts shall be discharged forthwith so far as the assets are sufficient to meet them.

. . . . (5.) The date hereinbefore in this section referred to is:—

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The claim put forward by the Inland Revenue authorities was at first in respect of the period 1921–22, for the sum of 628*l.* 16*s.* 6*d.*, and for which they claimed on behalf of the Crown to be preferential creditors. An originating summons was therefore taken out by the liquidator for the determination of this particular question. Later on, however, the Commissioners claimed priority for all the three several sums as preferential creditors, and an amended summons was accordingly taken out by the liquidator for the determination of the question: (*a*) Whether the Commissioners of Inland Revenue were entitled to be paid in priority to all other debts of the company, three several sums of 628*l.* 16*s.* 6*d.*, 536*l.* 18*s.* 3*d.* and 131*l.* 0*s.* 6*d.*, being sums deducted by the company pursuant to the Income Tax Act, 1918, from interest paid by the company under a mortgage as being income tax in respect of such interest, or (*b*) Whether the Commissioners were entitled to be paid in priority to all other debts of the said company, other than debts comprised in s. 209 of the Companies (Consolidation) Act, 1908, the said sum of 628*l.* 16*s.* 6*d.*, being one of the sums deducted as aforesaid.

Jenkins K.C. and *H. C. Bischoff* for the liquidator. The question is whether the Crown is a preferential creditor within s. 209 of the Companies (Consolidation) Act, 1908. (1) In the case of *Food Controller* v. *Cork* (2) the House of Lords held that the bankruptcy rule enacting that the Crown has no preference except such preference as is given by statute applies in the voluntary winding up of a company.

Therefore, under the section, the Crown can only claim in respect of "assessed taxes . . . . property or income tax assessed on the company up to April 5 next" before the date specified in the section and not exceeding in the whole one year's assessment.

It is admitted that it is the duty of a mortgagor (the

(*a*) In the case of a company ordered to be wound up compulsorily which had not previously commenced to be wound up voluntarily, the date of the winding-up order.

(*b*) In any other case, the date of the commencement of the winding up."

(1) See note (1) ante, p. 587.

(2) [1923] A. C. 647.

company in the present case) to account to the Crown for the income tax which the mortgagee would have to pay. The mortgagor is a debtor to the Crown. That is so by the Income Tax Act, 1918, All Schedules Rules, r. 21, sub-rr. 1 and 2.

[EVE J. If the mortgagor did not pay, could the Crown claim from the mortgagee ?]

It is submitted not. The mortgagee is not to be assessed on it. The mortgagor is obliged to deduct the tax and allow it to the mortgagee.

With regard to the sum mentioned in the summons—namely, 628*l*. 16*s*. 6*d*.—this is not an assessed tax, and the Crown can only recover it as a creditor. As to the other sums for which the Crown claims priority, it is for the respondents to show how such claim can be substantiated.

[EVE J. As the mortgagor has to deduct the tax, is there anything which makes a mortgagee entitled to ask whether the amount deducted has in fact been passed on to the Inland Revenue ?]

A mortgagor does not pay quite as the mortgagee's agent; the mortgagor is in a sense a kind of tax collector for the Crown. The mortgagee would probably be exempt, as it is not his concern to see if the mortgagor pays or not.

But the point as to this particular sum is that it is not "assessed" on any one at all.

If it were a question of this sum being payable out of profits, r. 19 of the All Schedules Rules would apply (1), but

(1) Income Tax Act, 1918. All Schedules Rules, r. 19: "Where any yearly interest of money, annuity or any other annual payment (whether payable within or out of the United Kingdom, either as a charge on any property of the person paying the same by virtue of any deed or will or otherwise, or as a reservation thereout, or as a personal debt or obligation by virtue of any contract, or whether payable half yearly or at any shorter or more distant periods), is payable wholly out of profits or gains brought into charge to tax, no assessment shall be made upon the person entitled to such interest, annuity or annual payment, but the whole of those profits or gains shall be assessed and charged with tax on the person liable to the interest, annuity, or annual payment, without distinguishing the same, and the person liable to make such payment, whether out of the profits or gains charged with tax or out of any annual payment liable to deduction, or from

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the company has made no profits or gains, therefore r. 21 is alone applicable.

It is material further to refer to the concluding words of sub-r. 2 of r. 21, " . . . . and shall be recoverable as such, and the provisions contained in s. 2 of the Stamp Duties Management Act, 1891, in relation to money in the hands of any person for stamp duty, shall apply to money deducted by any such person in respect of tax "—and to read with it s. 2 of the Stamp Duties Management Act, 1891. (1) The position therefore is that the person who has made the deduction is a debtor to the Crown for the amount, and it is not the mortgagee who is accountable nor the mortgagor as agent of the mortgagee, but the mortgagor who notionally got a sum of money in his hands for which he is accountable to the Crown as a debtor : *Lord Advocate* v. *Forth Bridge Ry. Co.* (2)

In *In re Winget* (3) the meaning of " assessed taxes " was considered.

The real point is, is this an assessed tax, that is, a tax which can be said to be " assessed " on the company, and as regards this particular sum, is it assessed within s. 209 ? As regards the other two sums, it is for the respondents to say how they ought to be dealt with, and how the question affects them.

R. P. Hills (*Sir Douglas Hogg A.-G.* with him). The claim put forward by the company cannot be brought within the statute; if it could, it would bring about the result,

which a deduction has been made, shall be entitled, on making such payment, to deduct and retain thereout a sum representing the amount of the tax thereon at the rate or rates of tax in force during the period through which the said payment was accruing due. The person to whom such payment is made shall allow such deduction upon the receipt of the residue of the same, and the person making such deduction shall be acquitted and discharged of so much money as is represented by the deduction, as if that sum had been actually paid."

(1) Stamp Duties Management Act, 1891, s. 2, sub-s. 1 : " Every person who, having received any sum of money as or for any duty, or any fee collected by means of a stamp, does not apply the money to the due payment of the duty or fee, and improperly withholds or detains the same, shall be accountable for the amount of the duty or fee, and the same shall be a debt from him to Her Majesty, and recoverable as such accordingly."

(2) (1890) 3 Tax Cas. 1, 5.

(3) [1924] 1 Ch. 550, 552, 556.

either that a measure introduced to aid the Crown would be used to its detriment, or that the general creditors of the company would be better off as the result of income tax than without it. The statute could not be construed in this way.

As regards the question whether a mortgagee should ascertain whether deductions from interest paid to him do reach the Crown, it is submitted that it is clearly to his interest, and he would be well advised to do so. But no question now arises on that point. In cases coming within r. 19 of the All Schedules Rules, it is provided that no assessment shall be made on the person entitled to the interest, but that the whole of the profits or gains—that is the apparent profits out of which the interest is paid—shall be assessed and charged with tax and charged on the person liable. There is no such provision in r. 21. But it is not suggested on behalf of the liquidator that this interest was not chargeable with tax and that tax was not properly deducted. [He referred to Dowell's Income Tax Laws, 8th ed., pp. 13, 413 and 414.] Sch. D of the Income Tax Act, 1918, s. 1 (*b*), says that interest of money is one of the clearest specific subject matters of taxation. One ought to look as well at s. 2. [Dowell at p. 524 and the All Schedules Rules referred to at p. 580, rr. 4, 5.] By r. 19 the Legislature applied the system of deduction of tax at the source to yearly interest of money payable out of profits and gains. Down to 1888, generally in relation to businesses, the assessment of tax is made upon the person liable, not for interest eo nomine, but for whatever the appropriate source was and appropriate Schedule,—upon income which is apparent.

In the case of the *London County Council* v. *Attorney-General* (1) the question was what was payment out of profits and gains, and it was held that it did not matter under which Schedule certain profits were brought into charge to tax, provided that they were so brought in.

This was followed in another case of *Attorney-General* v. *London County Council* (2), where the House of Lords held

(1) [1901] A. C. 26, 38, 39, 40. (2) [1907] A. C. 131, 133.

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that "payable out of" only meant really, "payable effectively out of."

But the real point is, assuming and to what extent interest was not paid out of profits as is claimed by the company, how does r. 21 operate?

If it be the true view that the sum deducted by the company was received by them as collectors for the Crown, then it must be a sum of money held by the company, which is not available for any other creditors at all except the Crown. That is the meaning of the first claim in the summons.

[EVE J. It is in fact earmarked.]

Yes. It is only as a tax collector for the Crown this duty of deducting tax is performed, and only the Crown, therefore, can have any claim. Therefore as between the company and its other creditors, the interest belongs to the mortgagee, except for the income tax. The statute interferes.

[EVE J. It stops it in transitu.]

Yes. In the *Forth Bridge* case (1) Lord Wellwood uses the expression, "The person deducting the income tax acts only as the agent or hand of the Crown"; and see also *Dalrymple* v. *Dalrymple*. (2)

[EVE J. The difficulty in these cases is that when you say that a particular fund becomes impressed with a trust for a particular person, you generally call the fund into existence in some way.]

That no doubt is so. Here the company has identified this sum: see the *Lord Advocate* v. *Edinburgh Corporation* (3), which illustrates the principle, also another case of *Lord Advocate* v. *Edinburgh Corporation* (4), where it was held that "interest of money" included short interest.

Sect. 24, sub-s. 3, of the Customs and Inland Revenue Act, 1888 (which is now r. 21), was considered in *Glamorgan Quarter Sessions* v. *Wilson* (5), where the learned judge held that the sub-section simply gave the Crown a remedy against the person paying as well as against the person receiving the

(1) 3 Tax Cas. 1, 5, 6.
(2) (1902) 4 F. 545, 551.
(3) (1905) 7 F. 972, 975.
(4) (1903) 4 Tax Cas. 627, 641.
(5) [1910] 1 K. B. 725, 735.

interest; that it was an additional remedy, and the person in question (in that case the quarter sessions) was chargeable and properly assessed. The principle was again referred to in *Schulze* v. *Bensted.* (1) These show that there is a clear charge of tax upon interest to the Crown in the Income Tax Act, and it is submitted that the Legislature plainly intended that the Crown should have the tax. There is an obvious charge of tax, and the only question is whether it can be collected.

With regard to s. 209 of the Companies (Consolidation) Act, 1908, it is a compendious provision. The phrase in it "assessed on the company" is a phrase, it is submitted, the same as "charged on the company by the Income Tax Act." Here is a tax charged on a taxpayer in favour of the Crown and a particular method of collecting it, and making a particular person, e.g., the person who pays the interest, liable for it. The word "assessed" should not be construed narrowly.

There is no real distinction between the words "assessed" and "charged." In the older Acts both words are used indifferently. In the Act of 1918, in none of the four Schedules is the word "assess" used, only the word "charge" [Dowell's Income Tax Laws, pp. 302, 388, 398 and 413.] In s. 120 the word "assessment" occurs.

[EVE J. If I read "assessed" as "charged," can you say this sum is charged on the company merely because there is an obligation on the company to pay?]

It is a clear instance of a charge of tax.

The word "charged" is most generally used in the Act for expressing the charge upon the person who is to pay.

The double phrase "assessed and charged" occurs in ss. 24, 25, 26, 27, 28 and 29 of the Act. It is the person who is charged: *Kensington Income Tax Commissioners* v. *Aramayo.* (2) Not only the Income Tax Act, 1918, but many other Acts, as well as the Companies Act, 1908, show that the word "assess" has not any precise meaning given it. Sect. 209 only gives an additional means of recovering the

(1) (1915) 7 Tax Cas. 30, 36. (2) [1916] 1 A. C. 215, 226, 227, 228.

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tax and by deduction at the source. With regard to the words of s. 209, sub-s. 1 (*a*), "not exceeding in the whole one year's assessment," it might imply an assessment in the strict sense, but strictly there is no such thing as a year's assessment. Income tax is collected, perhaps, by many assessments; it is not like super tax in this respect.

Jenkins K.C. in reply. It is apprehended that the three sums in question are not claimed by the Crown as a preferential creditor under s. 209 of the Companies Act, 1908, but as a cestui que trust. The company does not hold in a fiduciary capacity, because it never received anything. All that was done was that the company paid less than the full mortgage interest by deduction of tax: *In re Hallett & Co. Ex parte Blane.* (1) In all cases involving questions under an Income Tax Act, one has to construe it strictly against the Crown. This tax is not a tax assessed on the company; it is not a tax at all. It is money that is sought to be recovered, that is, collected by the company for the use of the Crown. It has ceased to be a tax at all; it is merely money that the company ought to have accounted for.

Cur. adv. vult.

March 31. EVE J. delivered the following written judgment. [After stating the facts as substantially set out above his Lordship continued as follows:] The question that I have to decide is whether the deductions made by the company when paying the interest to the mortgagee are payable to the Crown in priority to other debts of the company or pari passu with debts other than those that are preferential. By s. 209 of the Companies (Consolidation) Act, 1908, it is provided that in a winding up there shall be paid in priority to all other debts (inter alia) all assessed taxes, land tax, property or income tax assessed on the company up to April 5 next before the date of the commencement of the winding up, and not exceeding in the whole one year's assessment. I cannot see how these amounts can be brought within that section. They do not in any sense answer the description

(1) [1894] 2 Q. B. 237, 242, 244.

of a tax assessed on the company. On the contrary they constitute the income tax charged under Sch. D upon the mortgagee in respect of the interest receivable by him under his mortgage, and r. 21, sub-r. 1, operates only to make the mortgagor company the agent of the Crown for collecting the tax payable by the mortgagee. When the deduction has been made, or putting it in another way, when the mortgagor has collected the tax from the mortgagee, the liability to account for the amount is shifted to the mortgagor and becomes a debt due from him to the Crown. In my opinion there is no language in s. 209 which gives any priority to this debt. Nor can the argument prevail which would have the Court hold that these deductions are moneys in the hands of the mortgagor company impressed with a fiduciary character and capable of being followed and recovered as such. Before that doctrine can be applied to a case like the present, it must be established that a sum of money came into the hands of the alleged trustee, but here no such sum ever existed in a tangible form. The transaction was merely a payment to the mortgagee of the interest less the tax; the mortgagors received nothing. All they did was to provide a sum just sufficient to pay what had to be paid to the mortgagee, and there never came into existence any money to which the doctrine invoked could apply.

The result is that the Crown is not entitled to be paid any part of the three several sums in priority to the other creditors of the company. The costs of the summons will be paid out of the company's assets.

Solicitors: *Julius, Edwards & Julius; Solicitor to the Board of Inland Revenue.*

A. R. T.

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In re BERENS; *In re* DOWDESWELL.

BERENS-DOWDESWELL *v.* HOLLAND-MARTIN.

[1925. B. 2828.]

Will—Name and Arms Clause—Surname—De facto User of Arms—User under Royal Licence or Act of Parliament—Impossible Condition.

The plaintiff, George Berens, in 1915 became tenant for life in possession of Pull Court under the will of W. Dowdeswell, which declared that unless within twelve months the plaintiff assumed and used under the sanction of an Act of Parliament or licence from the Crown the surname and arms of Dowdeswell his estate should cease and the subsequent limitations be accelerated. The arms which the testator in fact used belonged to another family of the name of Dowdeswell. The plaintiff obtained by patent a grant of the right to use the name of Dowdeswell after his own name of Berens and to bear the Dowdeswell arms with certain variations.

In 1924 the plaintiff became tenant for life in possession of the S. estate under the will of H. Berens, which provided that every person so becoming entitled who should not bear the surname and arms of Berens must within a stated period "bear and use exclusively the surname and arms of Berens," on the non-performance of which condition the will provided for the defeasance of the estate.

By the Berens arms the testator meant a coat of arms used by his family for many years, but never granted or confirmed or recorded in the College of Arms, matriculated in the Lyon Register in Scotland, or confirmed in the Register of Arms in Ireland:—

Held, that the plaintiff did not bear the surname of Berens but the composite name of Berens-Dowdeswell; that the obligation to assume the Berens arms would not be satisfied by a mere de facto user, but only by the authority of a royal licence through the College, and the plaintiff, not having proved that he could not obtain a licence, was bound by the clause in the Berens will: But *held*, as regards the Dowdeswell will, that as the College would refuse to grant the Dowdeswell arms, as having already been allowed to others, the Court would assume that Parliament would not authorize their assumption in violation of the rights of third parties and of the laws of arms; and therefore that the condition requiring the plaintiff to assume those arms under the sanction of an Act or licence from the Crown was impossible and not binding.

ADJOURNED SUMMONS.

On June 5, 1915, the Rev. George Berens became tenant for life in possession of the Pull Court Estate under the limitations contained in the will of William Dowdeswell, who died on February 6, 1887.

The will provided that: "Every person having a surname or arms different from the surname or arms hereinafter required to be used who shall be entitled in possession or subject only to the said term of five hundred years as beneficial tenant for life or in tail male or in tail under the limitations herein contained and not be a married woman or who shall marry any female so becoming entitled shall as to every tenant within twelve calendar months after he or she shall so become entitled if of the age of twenty-one years or if not within twelve calendar months after attaining that age and as to every such husband within twelve calendar months after his wife shall become entitled in possession or be married to him (whichever shall last happen) assume and use under the sanction of an Act of Parliament or licence from the Crown my surname of 'Dowdeswell' either alone or in addition to his or her usual surname (yet so that the name of Dowdeswell shall be the last or principal name) and also the arms of Dowdeswell either alone or quartered with his or her family arms and shall thenceforth use the same surname and arms accordingly and that every person excluded by his or her already bearing the surname and arms aforesaid from the operation of the requisitions aforesaid shall continue the use of such surname and arms And that in case of neglect or refusal to comply with the requisitions of this proviso or any of them the estate or estates hereby limited for the life of the person or as the case may be the estate tail hereby limited to the person who or whose husband shall be guilty of such neglect or refusal shall cease and the subsequent limitations be accelerated."

The testator Dowdeswell in fact used arms which are "Or, a fess wavy between six billets sable." These are recorded in the College of Arms in the visitation of the county of Gloucester in the year 1623 for a family of the name of Dowdeswell. No descent from that family has been proved or recorded in the College of Arms. The testator Dowdeswell belonged to the Worcestershire family of Dowdeswell, and, although he in fact used the arms recorded for the Gloucestershire family of Dowdeswell, he had not established any right

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and was not entitled to use them. There was no doubt that he intended to describe those arms by the words in his will, "the arms of Dowdeswell." William Edward Dowdeswell (the first tenant for life under that will) took no steps to obtain any grant or confirmation of those arms. He died in 1893, and Edmund Richard Dowdeswell, the second tenant for life, for many years took no such steps. In 1906 he obtained by patent a grant of arms resembling the Gloucestershire Dowdeswell arms, but with modifying details differentiating them therefrom. He died in 1915. The plaintiff succeeded him as tenant for life, and by patent dated May 29, 1916, obtained a grant to himself and his issue of the right to use the surname of Dowdeswell in addition to and after his original surname of Berens, and to bear the same arms—namely, "Or, two barrulets wavy between six billets sable," as had been granted by patent, dated July 20, 1905, to his predecessor as tenant for life of the Pull Court Estate under William Dowdeswell's will. He therefore became known as and called himself George Berens-Dowdeswell, the two words being joined together by a hyphen. On March 15, 1924, he became tenant for life in possession of the Sidcup Estate under the limitations contained in the will of Henry Hulse Berens, who died on August 23, 1883. That will contained a names and arms clause, which so far as is material reads as follows: "Every person who shall become entitled in possession under this my will to the Settled Estates as tenant for life or tenant in tail male or in tail by purchase and who shall not bear the surname and arms of Berens shall within twenty-four calendar months after he or she shall have become so entitled in possession as aforesaid or if he or she shall be under the age of twenty-one years then within twenty-four calendar months after he or she shall have attained that age assume and thenceforward bear and use exclusively the surname and arms of Berens And if the person so becoming entitled as aforesaid be a female and shall marry then her husband shall within twenty-four calendar months after she shall have become entitled in possession as aforesaid or after her marriage (which shall last happen)

also assume and thenceforward bear and use exclusively the said surname and arms And if the person so becoming entitled as aforesaid or in the case of a married woman her husband shall fail to comply with the direction last hereinbefore contained then and in such case and at the expiration of the said twenty-four calendar months the estate of such person under this my will shall cease and determine."

Technically there were no Berens arms, because the right to bear arms was established either by a grant to the individual or by proof of his descent from an ancestor to whom a grant had been made, and there was no proof of such a grant to any member of the Berens family in this country. Arms identical with those used by the testator were used by an ancestor of his, one Nikolaus Behrens, of Hamburg, who died in 1795, and there was no doubt those were the arms referred to in the will as the "arms of Berens." It was possible for a grant of arms identical with those to be made in this country to a descendant of Nikolaus Behrens, but in fact the first tenant for life and her husband only obtained by royal licence a right to use those arms with a variation.

Question 1 of the summons asked whether the name and arms clause in the Berens will was binding on the plaintiff; Question 2 whether if the clause were binding what acts on his part would be a sufficient compliance to prevent the loss to him of the Sidcup Estate; and Question 6a, whether the name and arms clause in the will of the testator, William Dowdeswell, was and is binding on the plaintiff, and if so whether he had complied with the terms contained in the clause.

Greene K.C. and *Morton* for the plaintiff. A clause of this kind must be construed most strictly, and there must be no ambiguity of any sort or description: *Musgrave* v. *Brooke*. (1) The name and arms clause in the Berens will is not binding on the plaintiff, because when he became tenant for life of the Sidcup estates he bore two surnames, Berens-Dowdeswell, of which Berens was one. A man may have as many surnames

(1) (1884) 26 Ch. D. 792, 794.

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as he pleases, and that without an Act of Parliament: *Barlow* v. *Bateman*. (1) If the direction is that the name to be assumed may be borne "either alone or together with his or her family surname," the direction is complied with by placing the assumed name either before or after the family name: *In re Eversley*. (2) In *D'Eyncourt* v. *Gregory* (3) the condition required a devisee named W. to take and use "the surname of G.," and it was held that the assumption and use of the name G. before W. was not a compliance with the condition. That case only decides that where a person is directed to take a surname and does not already bear it, the surname to be assumed must be placed last. Here the plaintiff has as one of his surnames Berens, and as the clause only applies to persons not bearing that name he is not bound to bear the name Berens exclusively. Secondly, the clause is not binding on the plaintiff, because the condition that he shall bear and use the arms of Berens is impossible of performance. Bear means properly bear, and for that the authority of the royal licence through the Heralds' College is essential. No person by his own authority can assume arms: Davidson's Precedents in Conveyancing, vol. iii., Part I., p. 361; Vaizey's Settlements of Property, vol. ii., p. 1275.

The better opinion is that a condition simply requiring the devisee to bear a certain coat of arms (without using the word lawfully) cannot be performed by a mere voluntary assumption and use of the arms: Jarman on Wills, 6th ed., vol. ii., p. 1544. In *Bevan* v. *Mahon-Hagan* (4) the Vice-Chancellor was of that opinion, although in the Court of Appeal (5) the Master of the Rolls took the opposite view. It is submitted that it is impossible to obtain from the College of Arms a grant of the "Berens arms." There would be some addition by way of differentiation, as was done in the case of the first tenant for life on her application for a royal licence to bear and use the "Berens arms."

In the Dowdeswell will the testator by the words "the

(1) (1730) 3 P. Wms. 65.
(2) [1900] 1 Ch. 96.
(3) (1875) 1 Ch. D. 441.
(4) (1891) 27 L. R. Ir. 399, 411.
(5) (1892) 31 L. R. Ir. 342, 356.

Arms of Dowdeswell" meant the arms which he had in fact used, but which were allowed as a quartering in the 1623 visitation of Gloucester for a family of the name of Dowdeswell. The evidence shows that there is no record in the College of Arms of the right of any person to bear those arms before 1623, that the only evidence recognized by the college of a right to bear arms is some proper entry in its own records, and that in a case where the records show a title in an individual to particular arms a grant of the same arms will not be made to a person even if he can prove a common ancestor, unless such common ancestor is shown by the records to have himself been entitled to the arms. The plaintiff has not proved his descent from any person entitled to bear the "Dowdeswell Arms," and therefore a grant of those arms would not be made to him. It is submitted that the condition that the plaintiff shall bear and use the "Dowdeswell Arms" is impossible of fulfilment, and is not binding on him. If the plaintiff applied for an Act of Parliament to entitle him to bear those arms the result would be the same. Parliament does not violate private rights by private bills, and it would be left to the Heralds' College to say what arms the applicant was entitled to: see 6 & 7 Will. 4, c. 52 (Private Act).

Luxmoore K.C., *Rosher* and *Fox-Davies* for Cecil Berens, who is beneficially entitled under the trust of the rents and profits of the Sidcup Estate during the life of George Berens, and while he has no son, in the event of George not complying with the name and arms clause in the Berens will. When the plaintiff became entitled to the possession of the Sidcup Estate he did not bear the surname of Berens, but the composite surname of Berens-Dowdeswell. *Barlow* v. *Bateman* (1) only decided that a man may change his surname as often as he pleases, not that he can have more than one surname at the same time. Assuming that the plaintiff can have two surnames—namely, Berens and Dowdeswell—he has not complied with the clause, because the name Dowdeswell comes last: *D'Eyncourt* v. *Gregory* (2); *In re Llangattock*. (3)

(1) 3 P. Wms. 65. (2) 1 Ch. D. 441.
(3) (1917) 33 Times L. R. 250.

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Here the name of Berens is to be borne exclusively. That is a direction that Berens is not to be borne in addition to some other name—for example, Dowdeswell. In order to comply with the clause in the will the plaintiff must also bear the Berens arms. In fact the plaintiff bears the Dowdeswell arms with a variation. The testator imposes a condition on all those not bearing his surname and arms. The condition does not touch my client, because he bears the name of Berens and de facto bears the Berens arms : *In re Croxon.* (1)

Adams for the infant children of Cecil Berens.

Bennett K.C. and *R. Peel* for Edward Berens, entitled, in the event of Cecil Berens succeeding to the Pull Court Estate, to the Kevington Estate, of which Cecil is the present tenant for life. Every person becoming entitled in possession to the Pull Court Estate must within twelve months assume and use the name and arms of Dowdeswell, either under a licence from the Crown or under sanction of an Act of Parliament. The onus is on the plaintiff to prove the impossibility of obtaining a grant of the arms, and that he has not done. In 1916 the plaintiff applied for a licence to use not the Dowdeswell Arms but the arms granted in 1906 to his predecessor. It does not follow because it is not the present practice of the College of Heralds to grant to the plaintiff the right to use the Dowdeswell Arms in the present circumstances, that the practice was the same in 1916. Even if the plaintiff has proved that it was impossible to obtain a grant of the arms under royal licence he has not shown that it was impossible to obtain the right to bear the arms under an Act of Parliament. It is true that it is now unusual, except in special circumstances, to apply to Parliament, but in 1856 the Swinnerton's Name Act (19 & 20 Vict. c. 5 (Private Act)) was passed to enable Sir Lionel Swinnerton to bear that name.

C. L. Coote for a trustee of the Culford Fund Settlement.

Norman Daynes for the trustees of the Berens will.

J. V. Nesbitt for the trustees of the Dowdeswell will.

Cur. adv. vult.

(1) [1904] 1 Ch. 252.

March 15. RUSSELL J. Mr. Berens-Dowdeswell having equipped himself with a surname and a coat of arms for the purpose of securing his enjoyment of the Pull Court Estate naturally feels embarrassed at being called upon again to equip himself afresh with a surname and coat of arms for the purpose of securing his enjoyment of the Sidcup Estate. Equally naturally he wishes to retain both estates, and with a view to seeing if this is in any way possible he issued the present summons. By it he asks to have it determined in Question 1, whether the name and arms clause in the Berens will applies to and is binding on him, and if so in what respects; in Question 2, if it is binding on him, what acts on his part would be a sufficient compliance to prevent the loss to him of the Sidcup Estate; and in Question 6a, whether the name and arms clause in the Dowdeswell will was and is binding on him, and if so whether he has complied with its terms.

He contends that the Berens name and arms clause does not apply to him and is not binding upon him, and this for two reasons: First, because he claims that on March 15, 1924, he did bear the surname of Berens, and, secondly, if he is wrong as to this, he avers that it is impossible for him or any one else to assume the arms of Berens, and that accordingly this condition being impossible of performance, the original limitation to him survives and is unaffected by the provisions for defeasance. In other words, the argument is that in so far as the name and arms clause requires him to bear the surname of Berens he bears it, and in so far as it requires him to assume and bear the Berens arms it requires an impossibility. As regards the first point, in my opinion he does not bear the surname of Berens. His surname is Berens-Dowdeswell; one composite name of which no doubt the word Berens forms part; but the surname which he bears is not Berens; it is Berens-Dowdeswell, and nothing else. The point is not susceptible of lengthy argument; but certain authorities were cited, none of which appear to me to be of real assistance in the matter. They seem to show that in the absence of special words, you will not comply with a requirement to take and use a particular surname by

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placing the required name in front of your existing surname, though special words in the clause may authorize this being done: see *D'Eyncourt* v. *Gregory* (1); *In re Eversley* (2); and *In re Llangattock.* (3) *Barlow* v. *Bateman* (4) was cited to establish that a man may take as many surnames as he likes, but whether this means at one and the same time or from time to time, is not clear. No authority appears to me to touch the case of this plaintiff in regard to this will. It was said that the testator in stipulating for the future exclusive use of the name Berens by implication shows that he did not intend to subject to the clause any person of whose surname at the date of possession the word "Berens" formed a part. I cannot take this view. It shows, if anything, the testator's desire that as a surname Berens should not be contaminated by any associate. In the ordinary sense of the words and in common parlance the surname Berens-Dowdeswell is not the surname of Berens. Accordingly in my opinion the plaintiff's first contention fails.

His second contention arises in the following circumstances. The testator, Henry Hulse Berens (and the Berens family in this country for many years before him) had without doubt, on the evidence, used a certain coat of arms and crest which (to use the appropriate language) would formally be blazoned in the following words: "Argent, on a mount vert, a bear passant sable: Crest: on a wreath of the colours, a demi-bear sable." In more commonplace language the shield is of white or silver. It has a green mount, or base, upon which a black bear is walking. The crest is the upper part of a black bear.

These arms have never been granted or confirmed or recorded in the College of Arms, and do not appear in any official register there. Neither have they been matriculated in the Lyon register in Scotland, or confirmed in the register of Arms in Ireland.

But what the testator intended to refer to as the Berens

(1) 1 Ch. D. 441.
(2) [1900] 1 Ch. 96.
(3) 33 Times L. R. 250.
(4) 3 P. Wms. 65.

arms is, I think, clear. As is pointed out by Mr. Bellew, Portcullis Pursuivant, in his affidavit, there is technically no such thing as the Berens arms. Arms are personal, the right to them being established by grant to the individual, or by proof of descent from an ancestor who was himself personally entitled to arms. Apparently no member of the Berens family in this country ever had this personal right to bear arms; but I have no doubt, and I so hold, that by the words, "the Berens Arms," the testator referred to the arms which I have described. Further, I hold (in accordance with the view expressed in many text-books), that an obligation to assume arms will not be satisfied by a mere de facto user, but that the authority of the royal licence through the College of Arms is required.

The plaintiff contends that it is impossible for him to obtain from the College of Arms a grant of the Berens arms, but only a grant of arms resembling them, but with some addition by way of differentiation. To succeed here, on this point, he must by evidence satisfy me that this is the fact. He has not put the matter to the acid test of an application to the College of Arms, but he claims that the evidence proves his contention.

The plaintiff's affidavit states that in 1885 the testator's daughter, who was the first tenant for life of the Sidcup Estate under his will, and her husband presented a joint petition to the Crown, and were authorized by royal licence to bear the surname and arms of Berens provided the arms were first exemplified in the College of Arms; and that they received by patent, dated August 18, 1885, a grant and exemplification of arms resembling the Berens arms as hereinbefore described, but with additions by way of differentiation. The affidavit further states that the reason for this was that the arms used by the testator were in fact the arms of a family called Kellett. This however has been shown to be a mistake arising from the confusion of a bear with a boar. All I know from this evidence is that the first tenant for life and her husband obtained a grant of arms which were different in some respects from the arms used by the

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testator. I am not told why this was done or whether any attempt was then made to establish or record that the arms used by the testator existed of right by a foreign grant or otherwise. That a foreign grant of these arms may have been made to an ancestor of the testator is a possibility, for it appears from Mr. Bellew's affidavit that the identical arms were used by a Nikolaus Behrens (the name is spelt with an " h " there be it noted), a Captain of the Civil Guard in Hamburg, who died in 1795, and there is no doubt that the testator's ancestors had associations with Hamburg. But Mr. Bellew in his affidavit, speaking with knowledge derived from his office, states that in his opinion the arms used by the testator could now be officially registered to any of the surviving descendants in the male line of one Herman or Hermanus Berens, who died in 1794, " with or without some modifications of detail." This Hermanus or Herman Berens was the Berens who in 1760 purchased the Kevington estate, and the plaintiff is descended from him in the male line. In view of this statement by Mr. Bellew, which I read as indicating that it is not impossible for a grant to be made to such a descendant without modification, I must hold that the plaintiff has failed to establish that it is impossible for him to assume the Berens arms.

The only way, it seems to me, in which he could succeed in establishing this impossibility is by trying and failing; but this for obvious reasons he is unwilling to do. The result is that the name and arms clause in the will of Henry Hulse Berens applies to and is binding on the plaintiff in all respects.

A further question, Question 6a of the amended summons, is whether on the true construction of the will of William Dowdeswell the name and arms clause therein contained is binding on the plaintiff, and if so whether he has complied with it? Whether it is binding depends upon whether the testator has provided for the defeasance of an estate upon the non-performance of a condition impossible of fulfilment.

The question for determination is this: Was it impossible for George Berens-Dowdeswell, within twelve calendar months of June, 1915, when he became tenant for life in possession

of the Pull Court Estate, to have assumed under the sanction of an Act of Parliament or royal licence the surname of Dowdeswell and also the arms of Dowdeswell? There is no dispute that he duly assumed the surname of Dowdeswell.

Was it impossible for him to have obtained a royal licence to assume and use the testator's arms? Such licence always requires the exemplification of the arms according to the College of Arms, otherwise the licence is void. Accordingly the question to be answered is: Was it impossible for him to have obtained a grant of the testator's arms? Upon the evidence before me now I have no doubt that this question must be answered in the affirmative.

The affidavit of Mr. Cary, York Herald, makes it clear, and his affidavit evidence remained quite unshaken after a skilful and careful cross-examination.

In order to get a grant of the testator's arms it would be necessary for the applicant to establish direct descent from some person to whom they had been allowed. This clearly is and was impossible for George Berens-Dowdeswell to do. It was suggested that he might, with labour and expense, have traced descent from one ancestor of the person in whose favour they were allowed in 1623. But the evidence is clear that if he had done so he would still not have obtained a grant of the testator's arms, but only of those arms with a modification, more or less elaborate, according to the distance of relationship between the applicant and the person in question.

It was further said that although the evidence might establish that Mr. George Berens-Dowdeswell could not now obtain a grant of the testator's arms, it had not been proved that he could not have done so in 1916. But the evidence satisfies me that his predecessor, Edmund Dowdeswell, endeavoured to do so in 1906 and failed; and that if George Berens-Dowdeswell tried to do so now he would equally fail. There is no evidence suggesting that the practice and requirements of the College of Arms have altered or fluctuated. In these circumstances I feel entitled and bound to hold that if George Berens-Dowdeswell had

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in 1915 or 1916 applied for a grant of the testator's arms he would have failed.

After considering all the evidence before me I am of opinion that, in imposing the condition of assuming and using by royal licence the testator's arms, the testator has imposed a condition impossible of fulfilment.

It was argued in conclusion that it had not been established that George Berens-Dowdeswell could not, in 1916, have obtained the sanction of an Act of Parliament to his assumption and use of the testator's arms. There is no evidence one way or the other; but I think I am entitled to draw upon common knowledge and common sense in this matter.

I do not pause to consider the kind of reception that Mr. George Berens-Dowdeswell would have met with if he had invited Parliament to divert its attention from the conduct of the great war in order to legislate for his personal and private needs. But this much I think is clear. Parliament would regard the rights of third parties, and the persons lawfully entitled to bear the testator's arms would be heard in opposition to the Bill. When once it was ascertained, as it must have been, that the College of Arms would refuse to grant those arms to George Berens-Dowdeswell because, by their records, they had been allowed to others, it seems to me impossible to accept any view except that Parliament, even if it entertained the application at all, would not have authorized an assumption of arms which would have been a violation both of the rights of third parties and of the Laws of Arms.

This view is borne out by the fact that in the only case brought to my attention of a private Act authorizing the bearing of particular arms (6 & 7 Will. 4, c. 52 (Private Act)) it appears from the recitals that the application was made upon the footing that the arms should be borne in such manner as might be conformable to the Laws of Arms. This view also appears to coincide with that expressed in a note to Davidson's Precedents in Conveyancing, 3rd ed., vol. iii., Part I., p. 356.

The result is as follows: In answer to Question 1 I declare that the clause applies to the plaintiff, and is binding on him in all respects. In answer to Question 2 I declare that he will comply with the clause by obtaining a royal licence to bear the surname and arms of Berens followed by a grant and exemplification of arms: "Argent, on a mount vert a bear passant sable." In answer to Question 6a I declare that the clause so far as it imposes a condition of assuming the arms of Dowdeswell was not and is not binding on the plaintiff.

Solicitors: *Trower, Still & Keeling; Rashleigh, Turner, Mann & Rosher; Payne & Co.; Willis & Willis, for Taynton & Son, Gloucester.*

J. B. B. M.

RELY-A-BELL BURGLAR AND FIRE ALARM COMPANY, LIMITED *v.* EISLER AND OTHERS.

[1925. R. 2927.]

Restraint of Trade—Negative Stipulation—Reasonableness—Master and Servant—Covenant not to enter other Employment or be interested in the similar Business of another Company—Injunction—Damages.

The defendant Eisler entered the employment of the plaintiffs under an agreement which provided that during the term of his employment with the company he should not enter into any other employment nor be interested in the business of any other company, firm or individual installing or dealing with burglar or fire alarms. During the currency of the term Eisler entered the employment of a competing company:—

Held, that the restriction was valid, but that the Court would not grant an injunction restraining Eisler from continuing in the employment of the competing company nor an injunction restraining the competing company from continuing to employ him, as the plaintiffs' remedy was in damages.

The Court granted an injunction restraining Eisler during the currency of the term from being interested in the business of the defendant company or any business installing or dealing with burglar or fire alarms.

WITNESS ACTION.

Under an agreement of April 5, 1922, between the plaintiff company and the defendant Eisler, "the inventor," the

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company covenanted to employ and the inventor to serve for five years from "the date hereof." The agreement provided: "The inventor during the term of his employment with the company shall not enter into any other employment, but shall do his best to promote the interests of the company and shall in all respects serve them faithfully and shall not during the said term be interested in the business of any other company, firm or individual installing or dealing with burglar or fire alarms." On November 7, 1925, Eisler, in breach of his agreement, left the service of the plaintiffs. On December 3, 1925, the Ideal Burglary and Fire Protection Corporation, Ld., the second defendant, was incorporated in order to carry on business as manufacturers and installers of burglary and fire automatic detector alarms. On December 4, 1925, Eisler was allotted one out of the only four shares in the defendant company ever allotted, and on the same day he was appointed a director of the company, and engineer at a salary of 12*l.* a week.

The plaintiffs claimed: (1.) a declaration that by virtue of the indenture of April 5, 1922, the defendant Eisler is bound until April 5, 1927, not to enter into the employment of any company, firm or individual, other than the plaintiff company, or any other company, firm or individual installing or dealing with burglar or fire alarms; (2.) an injunction restraining the defendant Eisler until April 5, 1927, from entering into or continuing in the employment of the defendants, or of any company, firm or individual other than the plaintiff company, or from being interested in the business of the defendant company, or of any company, firm or individual, other than the plaintiff company, installing or dealing with burglar or fire alarms; (3.) an injunction restraining the defendant company until April 5, 1927, from employing Eisler; (4.) damages.

Bennett K.C. and *W. F. Waite* for the plaintiffs. This contract is valid in point of law: *William Robinson & Co.* v. *Heuer.* (1) The plaintiffs are entitled not only to

(1) [1898] 2 Ch. 451.

damages against the defendant Eisler, but also to an injunction restraining him from entering the employment of any company other than that of the plaintiff company: *Lumley* v. *Wagner* (1); *Bowen* v. *Hall.* (2) In the latter case a servant had contracted not to engage himself to any one but the plaintiff for a term of five years. The servant having engaged himself otherwise the plaintiff brought an action and asked for an injunction to restrain him from so doing. In ordering a new trial the Court of Appeal said that the jury ought to be directed in the event of a verdict for the plaintiff to find the amount of damages to be awarded against the servant, first, in the event of the Court thinking the case a proper one for an injunction and damages, and secondly, in the event of the Court thinking the case a proper one for damages only. In *Ehrman* v. *Bartholomew* (3) and *Chapman* v. *Westerby* (4), if the Court had granted injunctions in the terms of the covenants the servant could not have made a living either by serving or by carrying on a business independently. Here the covenant does not prevent the defendant carrying on business independently. The Court can also restrain the defendant company from harbouring Eisler by keeping him in their employment. To do so is a wrongful act, for which they are responsible in law: *Lumley* v. *Gye* (5); *Pilkington* v. *Scott.* (6) *Lumley* v. *Gye* (5) was rightly decided, because it is a violation of a right to interfere without justification with contractual relations recognized by law: *Quinn* v. *Leathem.* (7) Eisler is a shareholder in the defendant company, and is therefore interested in it in breach of his agreement with the plaintiffs.

Winterbotham for the defendants. The clause is in restraint of trade and therefore void, unless the plaintiffs show that it is reasonably necessary to protect their business: *Whitwood Chemical Co.* v. *Hardman* (8); *Lumley* v. *Wagner* (1); *Johnson* v. *Shrewsbury and Birmingham Ry. Co.* (9);

(1) (1852) 5 De G. & Sm. 485.
(2) (1881) 6 Q. B. D. 333, 340.
(3) [1898] 1 Ch. 671.
(4) [1913] W. N. 277.
(5) (1853) 2 E. & B. 216, 224.
(6) (1846) 15 M. & W. 657, 660.
(7) [1901] A. C. 495, 510.
(8) [1891] 2 Ch. 416.
(9) (1853) 3 D. M. & G. 914.

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Montague v. *Flockton*. (1) The plaintiffs have not discharged the onus upon them. If the clause is valid the remedy is damages and not injunction: *Ehrman* v. *Bartholomew* (2); *Chapman* v. *Westerby*. (3) The fact that Eisler is employed as a servant by the defendant company does not make him interested in their business. The interest must be proprietary or pecuniary: *Gophir Diamond Co.* v. *Wood*. (4) Eisler only holds one qualifying share in the defendant company.

RUSSELL J. It is said that this clause is in restraint of trade and that it is void at law, because the plaintiffs have not discharged the onus which is upon them of proving that it is reasonably necessary for the protection of their business. For that proposition authorities such as *Whitwood Chemical Co.* v. *Hardman* (5) and other cases there cited were relied upon. Upon consideration, it appears to me that that those cases are not in point in the present case. They deal with the rights and obligations of the parties to certain agreements under clauses which apply to the period after the term of service has come to an end in accordance with the provisions of the contract of service, and not with the rights and obligations of master and servant during the period of service stipulated for by the contract.

In this case the provisions of the clause relate solely to the period of service. The first branch of the clause provides for undivided and faithful service, and the second branch for the prevention of a conflict between the servant's duty and his interest. Such provisions, it appears to me, must from their very nature be valid at law, binding on the defendant Eisler, and impose upon him a liability from which he cannot escape through his own breach of contract: see *William Robinson & Co.* v. *Heuer*. (6)

It was next argued that even if this clause were valid at law, no injunction could be granted to restrain a breach of it, that the remedy was one in damages, and that the Court would not grant an injunction. For that proposition

(1) (1873) L. R. 16 Eq. 189.
(2) [1898] 1 Ch. 671.
(3) [1913] W. N. 277.
(4) [1902] 1 Ch. 950.
(5) [1891] 2 Ch. 416.
(6) [1898] 2 Ch. 451, 456.

reliance was placed upon *Ehrman* v. *Bartholomew* (1) and *Chapman* v. *Westerby*. (2)

In *Ehrman* v. *Bartholomew* (1) a traveller agreed to serve a firm of wine merchants for a term of ten years unless his employment was terminated by the employers after the first year by three months' notice in writing. Clause 3 of the agreement provided as follows : " The traveller shall diligently and continuously employ himself as the traveller of the firm for the purpose of selling the firm's goods, and shall use his best endeavours to obtain new customers for the firm, and to extend business, and shall devote the whole of his time during the usual business hours in the transaction of the business of the firm, and shall not in any manner directly or indirectly engage or employ himself in any other business, or transact any business with or for any person or persons other than the firm during the continuance of this agreement." The employee there, as here, broke his agreement, left the service of the employers before the term of his service had expired, and entered the service of another firm of wine merchants. The old employers commenced an action in which they moved for an injunction to restrain the defendant from " in any manner directly or indirectly engaging or employing himself in any business other than that of the plaintiffs' firm, and from transacting any business with or for any person or persons other than the plaintiffs' firm, and in particular from acting as a traveller for Messrs. Marzell & Co., and from soliciting orders for and on behalf of the said Messrs. Marzell & Co." The notice of motion, therefore, although it asked in general terms for an injunction to restrain the defendant from entering the employment of any other person or engaging in any business, included also a request for an injunction to restrain him from remaining in the employment of the particular competing firm for whom he was getting orders. Romer J. before whom the case came, with obvious reluctance declined to grant any injunction on the ground that the covenant which the plaintiffs were seeking to enforce was one which would prevent the

(1) [1898] 1 Ch. 671. (2) [1913] W. N. 277.

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employee from entering into anybody's service or engaging in any business and therefore that an injunction, if granted, would amount to enforcing specific performance of an agreement for personal service. It is to be observed that an injunction in a limited form, confined to restraining the defendant from remaining in the services of the competing firm, to which the objection of specific performance of a personal service agreement would not have applied, was not granted.

The case of *Chapman* v. *Westerby* (1) before Warrington J. is of a somewhat similar kind. There the plaintiffs and the defendant agreed to buy a steam trawler, of which the defendant was to be skipper, and to run it as partners. The arrangement was carried out by two agreements—namely, an agreement for a partnership between the parties for ten years, and a service agreement, by which the defendant agreed for the term of ten years to act as skipper of the trawler. Clause 3 of the latter agreement provided: "The skipper shall during the period aforesaid give his whole time, attention, ability and energies to the performance of his duties as such skipper as aforesaid and shall not give his time or personal attention to any other business or occupation." The defendant had threatened that he would not sail in the partnership trawler, but that he would sail under another owner. The motion was for an injunction to restrain the defendant from sailing or acting as skipper in or to any trawler or vessel other than the partnership steam trawler without the consent of the plaintiffs, and from giving his time or personal attention as skipper or otherwise to any business or occupation other than the occupation of acting as skipper to the partnership trawler contrary to the provisions of the agreement of service. Here again the notice of motion asked for an injunction in general terms which, if granted, would have precluded the defendant from engaging in any kind of business, but it also asked that the defendant should be restrained from acting as skipper to any trawler other than the partnership trawler. Warrington J. refused to grant an injunction. After citing various authorities,

(1) [1913] W. N. 277.

including *Whitwood Chemical Co.* v. *Hardman* (1); *Ehrman* v. *Bartholomew* (2); and *Lumley* v. *Wagner* (3), the learned judge said that those cases "showed that it was essential that the negative stipulation which the Court was asked to enforce should be a stipulation requiring the contracting party not to do some particular act on which the Court can put its finger, and so frame the injunction as to restrain him from doing that act. In the present case the only stipulation which was sought to be enforced"—that is, the only stipulation in the contract—"was that the defendant should not give his time or personal attention as skipper or otherwise to any other business or occupation other than that of acting as skipper to the partnership trawler. In the face of those authorities it was impossible to say that such a stipulation could be enforced by injunction. To so enforce it would involve this, that so far as earning his living was concerned the defendant would have to be absolutely idle for the term of ten years or continue this contract of personal service; in other words, it would for all practical purposes be granting specific performance of a contract of service, a thing which the Court would never do. The motion must therefore be refused."

In both those cases an interlocutory injunction was sought, which in terms would have prohibited the defendant from entering any employment or being engaged in any employment. In each case the period of service stipulated for by the contract was still current, and in *Ehrman* v. *Bartholomew* (2), the defendant had broken his contract of service by refusing to be employed, and in *Chapman* v. *Westerby* (4) had threatened to do so. In each case the remedy of injunction was refused.

It was said on the other side that there were points of distinction. It was said that the covenants in those two cases were so framed that the servant, if the covenants were enforced, could make his living neither by serving nor by carrying on business independently; whereas in the present

(1) [1891] 2 Ch. 416.
(2) [1898] 1 Ch. 671.
(3) 5 De G. & Sm. 485.
(4) [1913] W. N. 277.

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case the covenant only prohibited serving. Therefore, it was said, he was still free to start in business on his own account, and it could not be said, if an injunction were granted in the terms of the covenant, that he would be forced to remain idle and starve. That distinction seems to me somewhat of a mockery. It would be idle to tell this defendant, a servant employed at a wage, that he must not serve anybody else in that capacity, but that the world was still open to him to start business as an independent man. It seems to me that if I were to restrain this man according to the terms of the covenant, he would be forced to remain idle and starve.

Then it was said that *Bowen* v. *Hall* (1) was an authority that in such circumstances as the present the Court could grant an injunction, and that the language used by Lord Selborne, which, indeed, was upon this point of the case the unanimous decision of the tribunal, showed that. *Bowen* v. *Hall* (1) is a very peculiar case, and it is not easy to follow exactly from the report what the true facts were in relation to this particular point, but there there was an agreement which the majority of the Court interpreted as being a service agreement, and that agreement contained a clause or undertaking by Pearson, the servant, or the person who was considered to be in the position of servant, in these terms: "I also agree not to engage myself to any one else for a term of five years." In breach of his agreement Pearson engaged himself to the defendants Hall and Fletcher. The plaintiff brought an action against them and against Pearson, claiming damages against the new employers, and an injunction to restrain them from employing Pearson. Against Pearson the plaintiff claimed only an injunction to prevent him engaging himself to the new employers during the currency of the five years mentioned in the contract of service. An interim injunction was granted in the terms claimed as against all the defendants; so that there was an interim injunction against Pearson restraining him from engaging himself to the new employers. The action came on for trial at the assizes, and Manisty J. held that there was no evidence to enable the plaintiff to

(1) 6 Q. B. D. 333.

maintain his action against the defendants Hall and Fletcher, the new employers, and directed a verdict to be entered for them. The plaintiff then applied for and obtained a rule nisi against all the defendants for a new trial. The rule was argued, and the Divisional Court made the rule absolute as against the new employers, Hall and Fletcher, but discharged the rule as against the defendant Pearson. Hall and Fletcher appealed to the Court of Appeal for a new trial, and there was a cross-appeal by the plaintiff Bowen against the order which discharged the rule nisi as regards the defendant Pearson. Upon the question as regards the new employers the Court was not unanimous. But upon the question as to the order discharging the rule as against the defendant Pearson the Court was unanimous. The unanimous decision of the Court was delivered by Lord Selborne, and in the course of the remarks he then made, he uttered the phrase on which Mr. Bennett relied in this case. He points out (1): "The relief asked against Pearson in the action was injunction; an interim injunction was granted before the trial; and the case went down for trial against all the defendants at the same time and upon the same issues of fact. The effect of leaving the verdict to stand in Pearson's favour would be to entitle him to judgment in the action, which cannot be right if his contract with the plaintiff was broken in the manner alleged; and if upon the evidence given at the trial that question of fact could properly be now determined in Pearson's favour, it is impossible that upon the same evidence it could also be right to order a new trial as against the other defendants. We think, therefore, that the plaintiff's appeal must be allowed, and that there ought to be a new trial as to all the defendants. But as, when the proper time comes to give final judgment, the consequences of a verdict for the plaintiff will not necessarily be the same as to Pearson, and as to the other defendants, we think that the judge at the trial ought to give such directions to the jury as will enable the Court, if the plaintiff should succeed, to deal with the particular case of this defendant as may be just." Then he proceeds

(1) 6 Q. B. D. 333, 340.

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to say how that should be done: "For this purpose, they ought to be directed in the event of a verdict for the plaintiff, to find specially the amount of damages which they think ought to be awarded against Pearson, first, in the event of the Court thinking his case a proper one both for an injunction and for damages; and, secondly, in the event of the Court thinking it a proper case for damages only and not also for an injunction." It was suggested that those last three or four lines indicated that in that particular case, which for this purpose was said to be analogous with the present case, the Court could grant an injunction restraining the employee from continuing in the employment of his new employers. I think that is putting it too high. At the highest, it is simply a recommendation to the Court trying the action, out of greater caution, that the jury should be directed to assess damages upon the true footing, and certainly is not a decision that an injunction could or would be granted, and in face of the two clear decisions of Romer J. (1) and Warrington J. (2) I feel bound to hold that an injunction restraining the defendant Eisler from continuing in the employment of the defendant company cannot be granted.

Then it was said, and for this purpose the argument was founded upon certain remarks by Crompton J. in the case of *Lumley* v. *Gye* (3), that even although I could not restrain the defendant Eisler from continuing in the employment of the defendant company I could restrain the company from continuing to harbour him and keep him in their employment. The remarks of Crompton J. which are relied upon are dicta for this purpose, and it appears to me that I ought not to restrain the defendant company if I am unable to grant an injunction against the defendant Eisler, for the ultimate result of a series of injunctions granted against each successive new employer would be the same as if I had granted an injunction against the servant, and the plaintiffs would in effect be decreed specific performance of the contract of personal service. In my opinion, the only

(1) [1898] 1 Ch. 671. (2) [1913] W. N. 277.
(3) 2 E. & B. 216.

remedy of the plaintiffs in respect of the breach of the first branch of the clause is a remedy in damages.

As regards the second branch of the clause there is no difficulty. The defendant Eisler holds, albeit only one share in the defendant company, in fact a quarter of the issued capital, and it is sufficient for the purpose of this case, without going further into the question whether owing to his position as a director or otherwise he is interested in the business of the defendant company within the meaning of the clause, to decide that as a shareholder he is interested within the meaning of the second branch of the clause.

As regards the relief claimed, the plaintiffs are entitled to a declaration that by virtue of the agreement of April 5, 1922, the defendant Eisler is not entitled to enter into or continue in the employment of the defendant company, or be interested in the business of the defendant company, or of any other company, firm or individual installing or dealing with burglar or fire alarms. That is a declaration of an obligation.

There will be an injunction restraining the defendant Eisler until April 5, 1927, from being interested in the business of the defendant company, or of any company, firm or individual, other than the plaintiff company, installing or dealing with burglar or fire alarms.

There will be no injunction restraining the defendant company from employing Eisler, but there must be an inquiry as to the damages sustained by the plaintiff company by reason of the breaches by the defendant Eisler of the agreement.

Solicitors: *Raleigh S. Smallman; Copley Singleton & Co.*

J. B. B. M.

EVE J.

1926

March 26.

FEILDEN *v.* BYRNE.

[1926. F. 158.]

Restrictive Covenants—Modification—Action to enforce Covenants—Motion by Defendants for Leave to apply to the "Authority"—Stay of Proceedings in Action—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 84, *sub-s.* 9.

On January 28, 1926, the plaintiff as tenant for life of a settled estate brought an action to restrain the defendants from using certain premises at Blackburn for the purposes of a school in breach of restrictive covenants relating to the property. The defendants had purchased their property with notice of the restrictive covenants, and admitted that the school was carried on in breach thereof, but claimed that owing to the changes in the character of the neighbourhood they were entitled to a modification of the restrictive covenants so as to permit of the carrying on of this school. They accordingly moved in the action, pursuant to s. 84, sub-s. 9, of the Law of Property Act, 1925, for leave to apply to the statutory authority under that section, and that in the meantime the proceedings in the action should be stayed :—

Held, on the ground of the Court having no jurisdiction to give the defendants such modified relief as they claimed, that circumstances existed which justified the making of the order asked, but they must proceed with their application forthwith.

MOTION.

The plaintiffs in this action were Major James Hawley, Gilbert Feilden, and Ralph Cockayne Assheton; and the defendants were four clergymen carrying on a secondary day school for boys in Blackburn.

By the writ dated January 28, 1926, the plaintiffs claimed an injunction to restrain the defendants from using or occupying, or permitting to be used or occupied, the premises known as "Springfield," Shire Bank Road, Blackburn, in the county of Lancaster, for the purpose of a school, or of any other business, or for any purpose whatsoever other than a dwelling-house, and from permitting or suffering thereon anything which might be considered inconvenient, noisy, or detrimental to the neighbourhood, in breach of the covenants in that behalf contained in a deed of conveyance dated January 31, 1866.

By this conveyance Joseph Feilden, of Witton Park, the then owner of the Witton estate in Blackburn, conveyed in fee simple to one John Calvert a plot of land (forming part

of the Witton estate) in Shire Bank Road, Blackburn, in the county of Lancaster, reserving a yearly rentcharge of 10*l.* 14*s.* 2*d.* This deed contained a covenant by J. Calvert, his heirs or assigns, not to use or occupy or permit to be used or occupied any building then erected, or to be thereafter erected upon the said plot of land, or any part thereof, as an inn, public-house, or taproom, or for the purpose of any trade, business, or manufactory, or for any purpose whatsoever other than one or two dwelling-houses with the necessary outbuildings and conveniences, and not to permit or suffer anything which might be considered inconvenient, noisy, noisome, or detrimental to the neighbourhood. One house was erected on this plot of land now known as "Springfield," and this was purchased in 1925 and opened by the defendants in the name of St. Mary's College, Shire Bank Road, as a Catholic secondary school for boys. Practically the whole of the adjoining land forming part of the Witton estate had been sold on rentcharges, the various purchasers entering into similar covenants to those contained in the deed of January 31, 1866, the object being to maintain the amenities of a residential estate. The first plaintiff was the tenant for life of the Witton settled estate, and the second plaintiff was the only surviving executor of Joseph Feilden, who died on August 29, 1870. Mr. Robert James Howard was the agent of the estate and lived in the one house now belonging to the estate in the immediate neighbourhood of "Springfield." Directly he heard that the Catholic authorities, who had in August, 1925, purchased the freehold house and grounds known as "Springfield," intended to use it as a boys' school, he informed them that such a user would be a breach of the covenants contained in their conveyance and in the deed of January 31, 1866.

By their notice of motion dated March 3, 1926, the defendants applied to the Court in the present action asking that an order might be made under s. 84, sub-s. 9 (1), of the

(1) The provisions of s. 84 of the Law of Property Act, 1925, chiefly relied on by the defendants are as follows:—

Sect. 84, sub-s. 1: "The Authority hereinafter defined shall (without

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Law of Property Act, 1925, giving them leave to apply to the Authority in such section referred to, and staying the proceedings in the action in the meantime:

From an affidavit filed on behalf of the defendants in support of the motion it appeared that the premises called "Springfield" were purchased for 2250*l.*, and were conveyed to them in fee subject to a perpetual rentcharge of 37*l.* 9*s.* 8*d.* and to similar covenants to those in the deed of January 31, 1866. The defendants had used the school as a secondary school for boys who did not live on the premises but came there daily for classes (except on Sundays, Saturday afternoons and holidays). The defendants admitted that they purchased their premises with notice of the covenants contained in the deed of January 31, 1866, but they contended that by reason of a complete change in the character of the neighbourhood and other circumstances, the restrictive covenants ought to be deemed obsolete, or that the continued existence thereof would impede the reasonable user of the premises for private purposes without

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prejudice to any concurrent jurisdiction of the Court) have power from time to time, on the application of any person interested in any freehold land affected by any restriction arising under covenant or otherwise as to the user thereof or the building thereon, by order wholly or partially to discharge or modify any such restriction (subject or not to the payment by the applicant of compensation to any person suffering loss in consequence of the order) on being satisfied—

(*a*) that by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the Authority may deem material, the restriction ought to be deemed obsolete, or that the continued existence thereof would impede the reasonable user of the land for public or private purposes without securing practical benefits to other persons, or, as the case may be, would unless modified so impede such user . . . ." or

"(*c*) that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction."

Sub-s. 9: "Where any proceedings by action or otherwise are taken to enforce a restrictive covenant, any person against whom the proceedings are taken, may in such proceedings apply to the Court for an order giving leave to apply to the Authority under this section, and staying the proceedings in the meantime."

Sub-s. 10: "In this section the 'Authority' means such one or more of the official arbitrators appointed for the purposes of the Acquisition of Land (Assessment of Compensation) Act, 1919, as may be selected by the Reference Committee under that Act."

securing practical benefits to other persons, or would, unless modified, impede such user, and that the discharge of the covenants would not injure any persons entitled to the benefit of the same. They referred to the fact that notwithstanding the existence of similar restrictive covenants in the conveyances to other purchasers on the estate another school for girls had been started in the neighbourhood, also a nursing home, and other houses had been used for trades or professions without opposition. The agent of the estate, Mr. Robert James Howard, in his affidavit contradicted these statements evidencing the alleged complete change in the character of the neighbourhood, and referred to protests and complaints of neighbours about the noise made by the boys in the school. No pleadings had been delivered in the action, and a summons for directions which had been issued was directed to stand over to give the defendants an opportunity of making the present application.

Gover K.C. and *Wilfrid Hunt* for the applicants. The power conferred upon the Authority under s. 84 of the Law of Property Act, 1925, is somewhat startling, and is wider than that of the Court. The state of circumstances contemplated by para. (*a*) of sub-s. 1 of s. 84 exists in the present case, and the Authority has power to declare that the restrictions ought, on account of the changed conditions, to be deemed obsolete, and unless modified might impede the reasonable user of the land. By sub-s. 3 of the same section, before making any order, the Authority may direct inquiries to be made of any local authority, and notices may be given to the persons who appear to be entitled to the benefit of the restrictions intended to be discharged or modified; and by sub-s. 5 any order made by the Authority shall, in accordance with rules of Court, be subject to appeal to the Court.

Errington for the plaintiffs. There are objections to this application, which should not be granted except under strong circumstances. It causes delay in the action which has been commenced, it is very expensive, and will lead to two different trials. The matter is taken to the Authority in a very loose

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way, and it would seem to oust the concurrent jurisdiction of the Court, which is expressed to be preserved in sub-s. 1 of s. 84. I submit that the matter should take its usual course before this Court. If it is to be submitted to the Authority there should be formal admissions by the defendants (*a*) of notice of the covenant; (*b*) of the plaintiff's right to sue; and (*c*) that there has been a breach of the restrictive covenants; and the defendants should give an undertaking that if not successful before the Authority in obtaining a modification of the covenants, they would submit to judgment at once in the present action.

Gover K.C. in reply referred to the rules which had been made under the Act, and while admitting the covenants and the breach, did not admit that the plaintiffs could enforce them.

EVE J. I find some difficulty in determining the principles on which this jurisdiction ought to be exercised. By the writ issued on January 28, 1926, the plaintiffs claim an injunction to restrain the defendants from occupying certain premises in Blackburn to be used for the purposes of a school, or for any other business, or for any purpose whatever other than that of a dwelling-house, and from permitting or suffering thereon anything which may be considered inconvenient, noisy, or detrimental to the neighbourhood, in breach of covenants contained in an indenture dated January 31, 1866. The defendants do not dispute the existence of the restrictive covenants, or that they purchased the premises in question with notice of their existence, or that the secondary school now being carried on constitutes a breach; but they say that this is a proper case for modification of the restrictions, and they now apply under s. 84, sub-s. 9, of the Law of Property Act, 1925, for an order giving them leave to apply to the statutory Authority under that section, and in the meantime staying the proceedings in the action. The matter is one for the discretion of the Court, and I do not find anything in the section to guide the Court in the exercise of that discretion. Prima facie a plaintiff is entitled to select the

tribunal, and the Court ought not in my opinion to send him elsewhere unless there are substantial grounds for so doing. The grounds relied on here are that the defendants are not seeking for a complete release from the covenants, but only to have them so modified as to permit of the carrying on of this particular business of a school. Were the case one wherein the defendants were asserting a claim or asking for relief capable of being dealt with or given in the action I should not be inclined to make the order. If, for example, they were setting up as a defence to the action change of neighbourhood or conduct on the part of those entitled to the benefit of the covenants rendering it inequitable to enforce the restrictions I think the plaintiffs might properly insist upon such issues being dealt with by the Court; but where, as in this case, the defendants are asking for a modified relief such as the Court has no jurisdiction to give them, I think circumstances do exist justifying the making of the order. Accordingly I so do, but the defendants must proceed with their application forthwith and must prosecute it with due diligence. The costs of the motion will be costs in the action.

Solicitors: *Royds, Rawstorne & Co.; Robbins, Olivey & Lake, for Wilding & Son, Blackburn.*

G. M.

ASTBURY J.

1926

April 21, 22.

In re LLANOVER SETTLED ESTATES.

[1926. L. 669.]

Settled Land—Life Tenant—Limited Owner with Powers of Life Tenant—Heir at Law—"Resulting trust" during other Persons' Lives—"Implied or constructive" Trust—Settled Land Act, 1925 (15 *Geo.* 5, *c.* 18), *s.* 20, *sub-s.* 1, *cl. viii.*; *s.* 117, *sub-s.* 1, *cl. xii.*

Where the income of land devised to trustees is undisposed of during certain lives and results in possession to the testator's adult heir during those lives, that heir takes that income under an "implied or constructive" trust for payment thereof to him during those lives within the meaning of s. 20, sub-s. 1, cl. viii., of the Settled Land Act, 1925, read with the definition of trust in s. 117, sub-s. 1, cl. xii., and has consequently the powers of a life tenant.

In re Baroness Llanover [1907] 1 Ch. 635, 650 distinguished.

ORIGINATING SUMMONS.

By her will dated August 16, 1889, Baroness Llanover, after appointing executors and trustees, devised (cl. 3) her freehold, copyhold, and leasehold estates (including her Llanover estate) unto and to the use of her trustees with very full powers of management.

By cl. 4 she directed the payment of certain annuities, including life annuities, to her daughter Augusta, i.e., Mrs. Herbert, and her grandson Ivor.

By cl. 5 she directed her trustees to keep up the mansion houses and to permit Mrs. Herbert to reside therein during her life, paying her an allowance of 80*l.* a week out of the rents and profits during such residence, and subject as aforesaid during Mrs. Herbert's life, but not for a period of more than twenty years after the testatrix's death, to apply the ultimate surplus of the rents and profits in the manner by cl. 10 directed concerning the proceeds of her residuary property and after Mrs. Herbert's death (omitting a provision for a granddaughter Henrietta which was revoked by a codicil) upon trust to permit the testatrix's grandson Ivor, so long as he should be the husband of his then present wife or her widower (without having married again) or the husband of any Protestant Trinitarian Christian whom he might

marry after her death, to reside at the mansion houses with the same allowance during his residence and the same provision as to the surplus income and subject thereto to permit the testatrix's great-granddaughter Fflorens to reside at the mansion houses with the same allowance and the same provision as to the surplus income, and subject to and after the determination or failure of the several directions thereinbefore contained in trust for Fflorens' daughters by a Protestant Trinitarian Christian husband successively according to seniority in tail male with remainder to the testatrix's great-grandson Elydr's daughter by a Protestant Trinitarian Christian wife successively according to seniority in tail male.

Fflorens married W. F. Roch, a Protestant Trinitarian Christian, in April, 1911, but had as yet no issue. Elydr died a bachelor on November 12, 1917. Ivor, now Lord Treowen, was aged seventy-four.

By cl. 6 the testatrix directed that after the failure of the previous trusts the trustees should continue the annuities that had not ceased and subject as aforesaid should settle the said freehold premises to the use of Colonel Crichton-Stuart, since deceased, for life with remainder to his then present wife, since deceased, for life with remainder in the events that happened to the respondent Constance Crichton-Stuart in tail male with divers remainders over, but without any ultimate limitation of the fee to the testatrix's heirs. The copyholds and leaseholds were to be settled on corresponding trusts.

By cl. 10 the testatrix gave the residue of her property not disposed of by any codicil to her trustees in trust to realize the same and apply the proceeds "in the discharge of incumbrances on the estates hereinbefore devised" or "in the purchase of other estates near the devised Llanover estate" and to be held on like trusts and subject to like powers and directions as the said last mentioned estate.

The testatrix died on January 17, 1896, so that the maximum twenty years' accumulation period in cl. 5 ceased on January 17, 1916.

ASTBURY J. 1926 LLANOVER SETTLED ESTATES, *In re.*

On March 20, 1903, the Court of Appeal declared that Mrs. Herbert was life tenant of the mansion houses: *In re Baroness Llanover's Will.* (1)

On May 27, 1903, Farwell J. held that the trust for accumulation so far as it directed purchase of land was void under the Accumulations Act, 1892 (55 & 56 Vict. c. 58), s. 1: *In re Baroness Llanover* (2), and on August 10, 1903, on a motion to vary the minutes he declared in effect that as soon as the accumulations under cl. 5 became sufficient to discharge the incumbrances the surplus rents while undisposed of belonged and were payable by the trustees to Mrs. Herbert as heiress at law and next of kin of the testatrix and the persons or person deriving title under her.

On May 5, 1904, Mrs. Herbert issued a summons for a declaration that she had the powers of a life tenant over all the estates, whether or not the trust for accumulation was still subsisting.

On March 27, 1907, Swinfen Eady J. held that having regard to the nature and extent of her interest as heiress at law Mrs. Herbert had not at that time the powers of a life tenant: *In re Baroness Llanover.* (3)

Mrs. Herbert appealed, but on April 29, 1908, her appeal was dismissed by consent and the order of Swinfen Eady J. affirmed in accordance with a compromise agreement of April 28, 1908, approved by the Court and ordered to be carried into effect.

On June 29, 1908, an administration order was made declaring that the trusts of the will ought to be performed having regard to the terms of the compromise agreement.

On November 3, 1912, Mrs. Herbert died, and on January 17, 1916, the twenty years' accumulation period expired.

On October 9, 1922, an order was made sanctioning a further compromise agreement of July 24, 1922, made between Mrs. Herbert's executors, the will trustees, Ivor Lord Treowen, Fflorens Roch, Constance Crichton-Stuart and other parties

(1) [1903] 2 Ch. 16. (2) [1903] 2 Ch. 330.
(3) [1907] 1 Ch. 635, 650.

whereby the first compromise agreement was modified and extended.

On March 22, 1926, the trustees of the will issued this summons against Mrs. Herbert's executors and the ultimate remainderman in tail male to determine in whose favour the trustees ought now to execute a principal vesting deed or principal vesting deeds for giving effect to the requirements of the Settled Land Act, 1925.

The case raised two points. First, whether apart from the long and complicated compromise agreements and the orders made thereon Mrs. Herbert's executors would now have been life tenants, and secondly, whether on the true construction and effect of those agreements and orders their rights had been abrogated.

The first point is alone reported.

Clauson K.C. and *J. V. Nesbitt* for the will trustees. The question is in whose favour the principal vesting deeds ought to be made. It is admitted that until January 1, 1926, having regard to the decisions of Farwell J. and Swinfen Eady J. there was no life tenant. The question is whether the Settled Land Act, 1925, has made any difference.

Under Sch. II., para. 1, cl. 2, a vesting deed must be made in favour of the life tenant or statutory owner containing the particulars required by ss. 5 and 15, and Sch. I., Form 1.

By s. 117, sub-s. 1, cl. xxvi., "statutory owner" means the trustees of the settlement or other persons who, during a minority, or at any other time when there is no life tenant, have a life tenant's powers under this Act, and by cl. xxviii. a life tenant includes a person (not being a statutory owner) who has a life tenant's powers under this Act.

Sect. 23, sub-s. 1, provides that where under a settlement there is no life tenant nor, independently of this section, a person by virtue of this Act having a life tenant's powers, then—(*a*) any person of full age on whom such powers are by the settlement expressed to be conferred; and (*b*) "in any other case the trustees of the settlement" shall have the powers of a life tenant under this Act.

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The question is whether Mrs. Herbert's executors now have life tenant powers and are therefore life tenants in whose favour the vesting deeds ought to be made. If they are not life tenants there is no life tenant, and the will trustees are the statutory owners with life tenant powers under s. 23, sub-s. 1 (*b*).

Now Mrs. Herbert's executors, assuming they are not barred by the compromise orders, are only entitled during the gap while the rents are undisposed of, i.e., until Fflorens Roch dies or has a daughter; and to those rents they are only entitled by way of resulting trust.

They no doubt rely on s. 20, sub-s. 1, cl. viii., which enlarges the old cl. ix., on which Swinfen Eady J. decided, and gives a life tenant's powers to an adult person entitled in possession to the income of land under "a trust or direction for payment thereof to him during his own or any other life," whether or not subject (inter alia) to "cesser or determination," and will contend that as by s. 117, sub-s. 1, cl. xii., "trust" includes an implied or constructive trust, it therefore includes a resulting trust.

The fact that their interest is terminable is no longer an objection, but they do not take under any "express implied or constructive trust" for payment to them. They only take under a so-called resulting trust.

Now an implied trust is a trust declared by implication, e.g., a precatory trust. A constructive trust is a trust imposed by the Court on parties acting in special circumstances, as where a life tenant of leaseholds renews a lease in his own name. A resulting trust is in a different category altogether. It merely arises from a gap in the beneficial dispositions: see Lewin on Trusts, 12th ed., p. 124n. In the strict sense a resulting trust is not really a trust at all.

If, however, the Court is of opinion that Mrs. Herbert's executors would now be life tenants under the 1925 Act, we submit that their rights were entirely abrogated by the compromise agreements sanctioned by the Court and the orders made in accordance therewith, which, having regard to s. 118, are unaffected by the Act.

J. N. Gray for the remainderman adopted the same argument.

Topham K.C. and *Howard Wright* for Mrs. Herbert's executors. Swinfen Eady J.'s decision in *In re Baroness Llanover* (1) as regards the old cl. ix. turned on two points. The first point—namely, that the clause did not apply to terminable life interests, is removed by the present cl. viii. The second point—namely, that it was confined to express trusts, was doubted by conveyancers: Wolstenholme's Settled Land Acts, 10th ed., p. 467, and is removed by s. 117, sub-s. 1, cl. xii. In addition to this, both points are retrospectively removed by s. 118 and Sch. IV., para. 15.

The undisposed of interests clearly passed to Mrs. Herbert and her executors under the will-settlement: see s. 1, sub-s. 4, which is far wider than the old s. 2, sub-s. 2, of 1882.

The trustees contend that Mrs. Herbert's executors only took by way of resulting trust, and not under an implied or constructive trust within s. 117, sub-s. 1, cl. xii. But trusts are either express trusts or constructive trusts created by implication of a Court of equity, and constructive trusts are either resulting trusts or non-resulting trusts: Underhill on Trusts, 8th ed., pp. 9, 147. The terms implied trusts, trusts by operation of law (which include resulting and constructive trusts), and constructive trusts are almost synonymous: Lewin on Trusts, 12th ed., p. 124n.

In the present case the whole property was devised to the trustees with a gap in the beneficial limitations. There is therefore a resulting trust constituting a clear and active trust to pay the rents to Mrs. Herbert's executors during the gap, and they are life tenants.

The compromise agreements sanctioned by the Court and the orders in accordance therewith do not on their true construction and effect abrogate the executors' rights. If they do, we admit that there is no life tenant and the will trustees are the statutory owners.

J. V. Nesbitt in reply.

(1) [1907] 1 Ch. 635, 650.

ASTBURY J. 1926 LLANOVER SETTLED ESTATES, *In re.*

ASTBURY J. This is a summons in the matter of certain estates settled by the will of the late Lady Llanover. The applicants are the trustees for the purposes of the Settled Land Act, 1925, of the settlement created by that will. The respondents are the executors of the late Mrs. Herbert, who was the only child and heiress at law of the testatrix, and Constance Crichton-Stuart, who is first tenant in tail male under the ultimate remainders.

The question is in whose favour the applicants, as such trustees, ought now to execute a principal vesting deed or principal vesting deeds under the Settled Land Act, 1925. The solution of this matter is one involving an extraordinary amount of complication and difficulty. Lady Llanover made her will on August 16, 1889. [His Lordship stated the contents of the will and continued.]

In *In re Baroness Llanover* (1) Farwell J. decided that the provision in cl. 10 as to the purchase of other estates out of the surplus rents was invalid, and that the twenty years' direction to accumulate lasted only so long as there were undischarged incumbrances. The effect of this decision was that until Fflorens Roch died or had a daughter, the surplus rents of this estate were undisposed of after the incumbrances were discharged during the twenty years, or at the expiration of those twenty years. There was, therefore, a gap, during which the undisposed of surplus rents passed to Mrs. Herbert as heiress at law of the testatrix, and then to her executors.

In *In re Baroness Llanover* (2) Swinfen Eady J. held that Mrs. Herbert had not at that time the powers of a life tenant over the settled estates, the result being that the management of these estates remained in the will trustees. In arriving at his decision the learned judge's attention was called to s. 2, sub-s. 2, of the Settled Land Act, 1882, which provided that: "An estate or interest in remainder or reversion not disposed of by a settlement, and reverting to the settlor or descending to the testator's heir, is for purposes of this Act an estate or interest coming to the settlor or heir under or

(1) [1903] 2 Ch. 330. (2) [1907] 1 Ch. 635, 650.

by virtue of the settlement, and comprised in the subject of the settlement." The objects of that sub-section are, I think, correctly stated in Wolstenholme's Settled Land Acts, 10th ed., p. 367.

His attention was also called to s. 58, sub-s. 1, which gives the powers of a life tenant to certain limited owners "when the estate or interest of each of them is in possession," including (inter alia) :—

Clause vi. : "A tenant for his own or any other life, or for years determinable on life, whose estate is liable to cease in any event during that life, whether by expiration of the estate, or by conditional limitation, or otherwise, or to be defeated by an executory limitation, gift, or disposition over, or is subject to a trust for accumulation of income for payment of debts or other purpose."

Clause ix.: "A person entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life, whether subject to expenses of management or not, or until sale of the land, or until forfeiture of his interest therein on bankruptcy or other event."

The portion of Swinfen Eady J.'s judgment which is relevant to the question before me is as follows: "The question next arises, is the plaintiff [Mrs. Herbert] within cl. ix. as a person entitled to the income of land during her own or any other life? In this clause there is not any repetition of the words which occur in cl. vi.: '. . . . whose estate is liable to cease in any event during that life . . . . or to be defeated by an executory limitation . . . . over.' The plaintiff may be 'a person entitled to the income of land,' as the surplus income, if any, would be payable to her, but she is not entitled 'during her own or any other life,' as her interest is liable to determine at any moment on the birth of a daughter to Fflorens or Elydr. Nor is the surplus income payable to her 'under a trust or direction for payment thereof to her,' as was the case in *In re Jones*. (1) Her interest really arises because the will does not contain any 'trust or direction for payment thereof.' And, although

(1) (1884) 26 Ch. D. 736, 742, 743.

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s. 2, sub-s. 2, provides that an estate or interest in remainder or reversion not disposed of by a settlement and descending to the testator's heir is for purposes of the Act an estate or interest coming to the settlor under or by virtue of the settlement and comprised in the subject of the settlement, there is no provision in the Act that an heir taking on an intestacy the undisposed of surplus of rents and profits shall be deemed to take 'under a trust or direction for payment thereof to him' which the will does not really contain. For these reasons the plaintiff does not in my judgment fall within cl. ix."—he had already decided that she did not fall within cl. vi.—"the result is that the plaintiff has not at the present time the powers of a life tenant under the Settled Land Acts." That of course meant the Settled Land Acts then in force.

Certain agreements of compromise in the matter of this settled estate have been entered into and orders made in respect of them. I shall have to deal with those separately, but the first matter to be determined is whether under the new Act of 1925, Mrs. Herbert or her representatives have obtained the powers of a life tenant notwithstanding Swinfen Eady J.'s judgment based upon the previous Settled Land Act.

This question has to be determined now because Sch. II., para. 1, cl. 2, of the present Act provides that "As soon as practicable after the commencement of this Act, the trustees for the purposes of this Act of every settlement of land subsisting at the commencement of this Act (whether or not the settled land is already vested in them), may and on the request of the tenant for life or statutory owner, shall at the cost of the trust estate, execute a principal vesting deed (containing the proper statements and particulars) declaring that the legal estate in the settled land shall vest or is vested in the person or persons therein named (being the tenant for life or statutory owner, and including themselves if they are the statutory owners), and such deed shall (unless the legal estate is already so vested) operate to convey or vest the legal estate in the settled land to or in the

person or persons aforesaid and, if more than one, as joint tenants."

It is necessary in the management of this estate, having regard to the provisions of this new statute, that such a vesting deed shall be executed, and it has to be executed to the life tenant or the statutory owner. Life tenant includes a person not being a statutory owner who has the powers of a life tenant under this Act: see s. 117, sub-s. 1, cl. xxviii.

I will now attempt to consider whether, apart from the agreements of compromise and the orders of Court which have been made in this estate, there are in this new Act provisions which would result in Mrs. Herbert's executors now having the powers of a life tenant, notwithstanding the decision of Swinfen Eady J. under the previous statute.

Sect. 1, sub-s. 4, of the present Act provides very much as in the case of the old Act that "An estate or interest not disposed of by a settlement and remaining in or reverting to the settlor, or any person deriving title under him, is for the purposes of this Act an estate or interest comprised in the subject of the settlement and coming to the settlor or such person under or by virtue of the settlement." By reason of that sub-section, as also under the previous Act, the interest in the surplus rents during the gap was an interest which passed to Mrs. Herbert under or by virtue of the settlement, notwithstanding the fact that apart from the Act it passed to her, because it was not included in and dealt with by the settlement, but was undisposed of.

Sect. 20, sub-s. 1, provides that "each of the following persons being of full age shall, when his estate or interest is in possession, have the powers of a tenant for life under this Act, (namely):—"

Clause vi.: This is virtually the same as cl. vi. of s. 58, sub-s. 1, of the Settled Land Act, 1882, and I need not read it.

Clause viii. is in much wider terms than the old cl. ix., which it replaces. It now reads: "A person entitled to the income of land under a trust or direction for payment thereof to him

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during his own or any other life, whether or not subject to expenses of management or to a trust for accumulation of income for any purpose, or until sale of the land, or until forfeiture, cesser or determination by any means of his interest therein, unless the land is subject to an immediate binding trust for sale."

Sect. 117, sub-s. 1, cl. xii., provides that "trust" includes an implied or constructive trust.

Swinfen Eady J. held that under the old Act Mrs. Herbert was not entitled to this surplus income under a trust or direction for payment thereof to her. He came to that conclusion for two reasons. First, that there was no trust or direction in the settlement for payment of the surplus profits to Mrs. Herbert at all. She merely got them because they were undisposed of. Secondly, she was not entitled to them for her own or any other life, because they were liable to cesser in certain events. The present cl. viii. is to be read as including an implied or constructive trust for payment, and a person can hold for his own or any other life thereunder notwithstanding the possibility of a cesser during either life.

The will trustees contend that Mrs. Herbert did not take the surplus rents under an express trust, which is obvious, nor under an implied or constructive trust, properly so called. They contend that an implied trust means a trust declared by a party not directly but by implication. That no doubt is a strict and accurate statement, though not exhaustive. They also contend that a constructive trust is a trust that the Court elicits by a construction put upon certain acts of the parties, e.g., where a trustee renews a lease belonging to the trust in his own name. That again is perfectly accurate, but not, I think, exhaustive. They refer to Lewin on Trusts, 12th ed., p. 124n., where the learned author states: "The terms Implied Trusts, Trusts by Operation of Law, and Constructive Trusts, appear from the books to be almost synonymous expressions; but for the purposes of the present work the following distinctions, as considered the most accurate, will be observed: An implied trust is one declared

by a party not directly, but only by implication; as where a testator devises an estate to A. and his heirs, 'not doubting' that he will thereout pay an annuity of 20*l.* per annum to B. for his life, in which case A. is a trustee for B. to the extent of the annuity. Trusts by operation of law are such as are not declared by a party at all, either directly or indirectly, but result from the effect of a rule of equity, and are either: (1.) Resulting trusts, as where an estate is devised to A. and his heirs, upon trust to sell and pay the testator's debts, in which case the surplus of the beneficial interest is a resulting trust in favour of the testator's heir; or, (2.) Constructive trusts, which the Court elicits by a construction put upon certain acts of parties, as when a tenant for life of leaseholds renews the lease on his own account, in which case the law gives the benefit of the renewed lease to those who were interested in the old lease."

Mrs. Herbert's executors relied on two passages in Underhill on Trusts, 8th ed.—namely, p. 9, art. 3: "Trusts are created either intentionally by the act of the settlor (in which case they are called express trusts) or by implication of a Court of equity where the legal title to property is in one person, and the equitable right to the beneficial enjoyment of it is in another, in which case they are called constructive trusts," and p. 147, art. 26 (1.): "Constructive trusts are either resulting trusts (in which the equitable interest springs back or results to a settlor or his representatives), or non-resulting trusts." Those passages again are substantially accurate.

It is true no doubt, as the trustees contend, that a resulting trust in ordinary circumstances is in one sense not really a trust at all. Where property is settled or devised upon limitations that do not exhaust it, a resulting use or trust of the unexhausted part is left in the settlor or devisor. But where, as in the present case, property is devised as a whole to trustees and the trusts declared do not exhaust the income during some particular period, although there is a resulting trust so called to the settlor or her heir at law, it is really a trust construed by the Court in the trustees of the income

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which they so hold, and which they cannot apply in accordance with any express trust in the settlement and which in the present case they hold on trust to pay to the person entitled thereto by reason of this so-called resulting trust. That, I think, is within the general meaning of implied or constructive trust. Nothing of that sort could be considered by Swinfen Eady J., who had only the words "A person entitled to the income of land under a trust or direction for payment thereof to him." He held, as he was bound to hold, that the will contained no such trust or direction for payment of this undisposed surplus income.

Under the present Act, however, which unquestionably was passed to extend the provisions of the old Act in many respects, a person is entitled to a life tenant's powers if he is entitled to the income of land under an implied or constructive trust as well as under an express trust, and in my opinion, if nothing else had happened, Mrs. Herbert's executors would on the passing of the 1925 Act have been persons entitled to the surplus income under an implied or constructive trust for payment thereof to them. The property was held by trustees. They were under a trust to pay the income to somebody, and it was their duty to pay it to the person entitled, who in this particular case during the gap was Mrs. Herbert or her executors.

I am therefore of opinion that if there were nothing else to affect the question, Mrs. Herbert's executors would now have a life tenant's powers under the present Act, notwithstanding Swinfen Eady J.'s decision to the contrary under the narrower provisions of the previous Act, which in his opinion only applied to an express trust of a life interest not liable to cesser.

That the present Act was intended to have some effect of this character is shown by s. 118 and Sch. IV.

By s. 118: "For the purpose of removing certain doubts as to the construction and operation of the Settled Land Acts, 1882 to 1890, and validating past transactions, the provisions contained in the Fourth Schedule to this Act shall have effect.

Subject as aforesaid, this Act does not affect the validity of anything done or any order made or directions given by the Court before the commencement of this Act."

By Sch. IV., cl. 15: "Paragraph ix. of sub-s. 1 of s. 58 of the Settled Land Act, 1882, shall be deemed always to have had effect as if in that paragraph:—

(*a*) 'trust' included an implied or constructive trust;

(*b*) 'forfeiture' included cesser or determination by any means;

(*c*) after the words 'expenses of management' there had been inserted the words 'or to a trust for accumulation of income for any purpose';

but not so as to render invalid or prejudice any title or right acquired before the commencement of this Act."

The wider construction of the words "implied or constructive trust" as distinct from the narrower construction contended for by the trustees has for years before the passing of the present Act appeared in text-books and been treated as their true construction.

The result therefore is that if nothing further had happened beyond the death of Mrs. Herbert and the passing of the 1925 Act the vesting deed would I fear have had to be executed in favour of Mrs. Herbert's executors, notwithstanding the fact that the will trustees have for many years had the whole management and conduct of this estate, and Mrs. Herbert's executors would have had no interest in it, except the receipt of these surplus rents.

The trustees, however, contend that events have happened which prevent the application of this construction in the present case. [His Lordship then read the compromise agreements sanctioned by the Court and the orders made in accordance therewith, and continued:] The net result of all that is that at the present time Mrs. Herbert's executors are entitled to a fixed annuity out of the estate and are to have no further rights powers or interests therein. In other words Mrs. Herbert obtained only a limited part of what she claimed in her appeal, and by way of compromise gave up her appeal and the rest of her claim accordingly.

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Sect. 118 provides that "Subject as aforesaid, this Act does not affect the validity of anything done or any order made or directions given by the Court before the commencement of this Act." The effect of that with the documents and orders I have read is that Mrs. Herbert ceased, except for the limited period and the limited portion of the property, about one-fourth, referred to in the first compromise agreement, to have any of a life tenant's powers in respect of this estate. That limited power expressly ceased on her death, and from that time her executors have had no life tenant powers at all in respect of the estate. That has been sanctioned more than once by orders of the Court, which confirm the trustees' right to exercise these powers.

The net result is this. Sect. 23, sub-s. 1, provides that where under a settlement there is no life tenant nor, independently of this section, a person having by virtue of this Act a life tenant's powers, then in any case other than cl. (*a*), which does not apply here, (*b*) "the trustees of the settlement" shall have the powers of a life tenant under this Act.

By s. 117, sub-s. 1, cl. xxvi., "statutory owner" means the trustees of the settlement or other persons who, during a minority, or at any other time when there is no life tenant, have a life tenant's powers under this Act, and by cl. xxviii. life tenant includes a person (not being a statutory owner) who has a life tenant's powers under this Act.

Under Sch. II., para. 1, cl. 2, the vesting deed has to be executed by the trustees in favour of the life tenant or statutory owner, including themselves if they are the statutory owners, and life tenant there means a life tenant or a person having a life tenant's powers.

In my judgment in the circumstances I have detailed there is no life tenant or person with a life tenant's powers in respect of these surplus profits; the trustees are in fact the present statutory owners, and must execute the vesting deeds in their own favour.

On April 28 *J. V. Nesbitt* mentioned the case on the minutes

and pointed out that the vesting deeds of the mansion houses must be made in favour of Lord Treowen, the life tenant thereof. Astbury J. assented.

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Solicitors: *Freshfields, Leese & Munns; Farrer & Co.; Hunters.*

G. R. A.

FENNELL *v.* EAST HAM CORPORATION.

LAWRENCE J.

[1924. F. 1879.]

1925

Education—Public Elementary Provided School—Teacher—Dismissal—Educational Efficiency—Married Woman—Validity of Notice of Dismissal—Bona fides—Collateral or alien Purposes.

Oct. 28, 29, 30; *Nov.* 2, 3, 4; *Dec.* 10.

The Council of the defendant borough, as the Local Education Authority, in pursuance of a recommendation of their education committee, made after exhaustive inquiries and discussion, resolved that the engagements of all married women teachers falling under certain specified categories should be terminated; and, accordingly, notice was given to each of the plaintiffs to terminate her engagement. The plaintiffs, who were three married women, had for several years been engaged under contracts terminable by a month's notice on either side, as assistant certificated teachers in some of the defendants' schools, and were admittedly efficient teachers. It was proved that the object of the Council in reducing the number of the married women teachers was to create vacancies for unemployed single women teachers whom the Council trained for the teaching profession and for whom it was important in the interest of educational efficiency that teaching posts should be provided. In carrying out that policy, the Council, with the view of minimizing cases of hardship in the selection of married women teachers for dismissal, took into consideration the domestic circumstances and duties of the married women teachers and the earning capacity of their husbands. The plaintiffs sought declarations that the notices of dismissal were invalid on the ground that the Council in giving them did not act bona fide with the intention of discharging their statutory duties of maintaining educational efficiency, but acted with the illegitimate object of providing employment for unmarried women without reference to educational efficiency, of obliging married women teachers to confine themselves to home duties and of preventing those whose husbands were in regular employment from increasing the income of the joint home:—

Held, first, that the plaintiffs failed to discharge the onus which lay upon them of showing that the policy adopted by the Council of reducing the number of the married women teachers for the purpose of creating vacancies for unemployed single women teachers, and the steps taken to carry it out, were in excess of their statutory powers

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or were adopted or taken in pursuance of some illegitimate object; secondly, that the matters taken into consideration by the Council were not irrelevant from an educational standpoint, but were material factors in determining, not only whether the policy ought to be adopted, but the best method of applying it; lastly, that, as the defendants had acted bona fide and within their statutory powers, the action ought to be dismissed.

The principle of *Short* v. *Poole Corporation*, ante, p. 66, applied.

ACTION WITH WITNESSES.

The Council of the defendant borough (hereafter referred to as "the Council") was the Local Education Authority for the area in which the Shaftesbury Road Infants' School and the Brampton Road Girls' School were situate. Both these schools are public elementary schools provided by the Council. In the month of April, 1910, the Council engaged the plaintiff, Mrs. Fennell, as an assistant certificated teacher at the Shaftesbury Road Infants' School. In the month of September, 1919, the Council engaged the plaintiff, Mrs. Harbott, as an assistant certificated teacher at the Brampton Road Girls' School, and the plaintiff, Mrs. Hern-Ebdon, as an assistant certificated teacher at the Shaftesbury Road Infants' School. Each of the plaintiffs was at the date of her engagement and of the trial of the action a married woman. It was a term of each contract that the engagement should be terminable by a month's notice in writing on either side. On November 1, 1924, the Council gave to each of the plaintiffs a written notice terminating her engagement, in the cases of Mrs. Fennell and Mrs. Harbott from and after December 31, 1924, and, in the case of Mrs. Hern-Ebdon, from and after March 31, 1925. These notices were given in pursuance of a resolution passed at a meeting of the Council duly convened and held on October 28, 1924. Neither the resolution nor the notices gave any reasons for the termination of the engagements. It was admitted by the defendants that the plaintiffs were efficient teachers and that they had discharged their duties satisfactorily. On November 8, 1924, the plaintiffs commenced this action, in which they claimed a declaration that the notices terminating their engagements were invalid and inoperative and that their contracts for

service were subsisting and an injunction restraining the defendants from acting upon or enforcing the notices. The grounds upon which these claims were based were that the Council, in giving the notices, was not acting with the bona fide intention of discharging its statutory duties of maintaining educational efficiency in the schools at which the plaintiffs were teachers, but was acting for the alien purposes of: (*a*) providing employment for unmarried women without reference to educational efficiency; (*b*) procuring that married women should attend to their home duties; and (*c*) preventing married women, whose husbands were in regular employment, from increasing the income of the joint home by drawing salaries.

The following relevant facts, taken from the judgment of the Court, emerged at the trial:—

In the year 1922 it became apparent that in the defendant borough (as in other boroughs) more young persons had been specially prepared for the teaching profession than were likely to find employment in the public elementary schools within a reasonable period of their qualification. The Education Authorities had, out of the public funds, contributed towards the expenses of preparing these young persons for the teaching profession, both directly in the shape of bursaries and such like, and indirectly by contribution towards the upkeep of the Training Colleges. In these circumstances the Board of Education deemed it advisable in the autumn of 1922 to issue circulars to all Training Colleges and Local Education Authorities. The circular to the Training Colleges, which was dated October 19, 1922, asked the colleges to furnish certain information and to abstain from making any definite promise of admission to candidates for the autumn of 1923 pending the result of the inquiries which the Board was then making. The circular to the Local Education Authorities was dated November 21, 1922, and after calling attention to the circular to the Training Colleges, stated that the problem of adjusting the supply of certificated teachers to the effective demands of the schools was obviously affected by any action which the

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Local Education Authority was taking or might thereafter take (inter alia)] to reduce the number of married women employed.

Ever since the broad hint thus given to it by the Board of Education, the Council had entertained the policy of making room for unemployed single women teachers by reducing the number of married women teachers under consideration, but up to the autumn of 1923 no definite steps to carry such a policy into effect had been taken. On July 11, 1923, the East Ham Ratepayers' Association passed a resolution protesting against married women teachers remaining in the Council's employment, except in cases of exceptional hardship, and forwarded a copy of such resolution to the Council. It was not proved what was the real motive which induced the Association to pass this resolution. Mr. Pope, a member of the Council, who was called as a witness for the plaintiffs, suggested that it was passed out of political spite against himself, as his wife was a teacher; whereas Mr. Harper, another member of the Council who was called as a witness for the defendants, suggested that it was passed because some of the members of the Association had daughters who had been trained as teachers, but for whom no vacancies could be found. Whatever might have been the motive for passing the resolution, it caused the Council to bestir itself in the matter. As the result of this prompting and of a recommendation of the School Management Sub-Committee, dated October 10, 1923, the Council on October 30, 1923, appointed a Special Sub-Committee to consider and report upon the whole question of the retention in the service of married women teachers. This Special Committee first met on November 20, 1923, and, after considering certain statistics as to the married women teachers in the employment of the Council, and after discussing the question referred to it, resolved that, in its opinion, married women teachers in certain cases were occupying positions which might be filled by unemployed single women teachers, and that it was desirable that the question of terminating the engagements of these teachers should be considered. The Special Committee met

again on January 9, 1924, and then considered the question which of the married women teachers' engagements should be terminated in light of the resolution come to at its first meeting, and ultimately resolved to report that the engagements of all married women falling under certain specified categories (which included the plaintiffs) should be terminated. This report of the Special Committee came before the Education Committee on February 4, 1924. The Education Committee sat in camera to discuss the report, and after the meeting had been opened to the public the Education Committee recommended the adoption of the report, in so far as the principle of reducing the number of married women teachers, in order to make room for unemployed single women teachers was concerned, but referred the question of the retention of certain named married women (including Mrs. Fennell) back to the Special Committee for further consideration.

On February 12, 1924, the recommendation of the Education Committee was adopted by the Council. On March 26, 1924, the Special Committee held its third meeting and, after going fully into the questions referred back to it by the Education Committee, recommended that the engagements of (amongst others) the plaintiffs be terminated on certain specified dates. On March 31, 1924, those recommendations of the Special Committee came before the Education Committee, which sent them to the School Management Sub-Committee for consideration. That Sub-Committee considered and approved of the recommendations, and on May 5, 1924, those recommendations came before the Education Committee. The Education Committee, before discussing the recommendations, received a deputation from the married women teachers, of which deputation Mrs. Fennell and Mrs. Harbott were members. After having heard what the deputation had to say against the adoption of the recommendations, the Education Committee considered the recommendations and sent them back to the School Management Sub-Committee for the purpose of obtaining counsel's opinion on the legal position of teachers who had originally been appointed by the Little Ilford School Board and had been

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transferred to the East Ham Education Board, when those two boards were united in March, 1900. On May 19, 1924, the School Management Sub-Committee, after having obtained legal advice, confirmed their former recommendation to adopt the recommendations of the Special Committee. On June 2, 1924, the Education Committee resolved to recommend the adoption of the recommendations of the Special Committee. On June 17, 1924, the Council resolved to adopt the recommendations of the Education Committee. On July 7, 1924, the Education Committee considered and recommended the dates as from which the notices terminating the engagements of the various married women teachers, including the plaintiffs, should take effect. These recommendations were adopted by the Council on July 15, 1924. Thereupon the Education Committee, on October 20, 1924, recommended that the engagements of (amongst others) the plaintiffs should be terminated on the dates approved by the Council, and that the secretary be instructed to give the necessary notices forthwith. This recommendation was adopted by the Council on October 28, 1924, and thereupon the secretary gave the necessary notices.

Luxmoore K.C. and *J. B. Lindon* for the plaintiffs. The engagements of the plaintiffs were not validly determined. The Council did not act bona fide, but in dismissing the plaintiffs were actuated by irrelevant motives and did not properly consider educational efficiency. The evidence showed that they were biased against married women teachers and wanted to replace them by unemployed single women teachers: they considered that married women ought to attend to their domestic duties, and that preference ought to be given to a single woman over a married woman teacher whose husband was earning a salary. The Council have power to appoint teachers to hold office at the pleasure of the Council, and may remove them: Education Act, 1921, s. 148. In the case of non-provided schools the education authority have the power of dismissal only on "educational grounds": Education Act, 1921, s. 29, sub-s. 2 (*a*); *Sadler* v.

Sheffield Corporation. (1) Although, apparently, in the case of a provided school the authority has an unfettered power of dismissal under s. 148, yet the power is only exercisable in the performance of a statutory duty, and must be exercised with proper discretion, and all matters foreign to educational efficiency must be excluded from consideration. It is an implied term of the contract between the parties that the authority created by statute shall have regard to its statutory duties: *Hanson* v. *Radcliffe Urban Council* (2); *Price* v. *Rhondda Urban Council.* (3) In the latter case the Court held that the resolution to dismiss the teachers was passed in exercise of the statutory powers and duties of the Council, and the preface to the resolution indicating the desire to put an end to unemployment was inserted bona fide in the honest belief that they were acting in the best interests of their schools. The objects which the Council had in view were such objects as Romer J. in *Short* v. *Poole Corporation* (4) held to be in no way connected with educational efficiency.

Upjohn K.C. and *A. A. Bethune* for the defendants. The evidence shows that the Council did not dismiss the plaintiffs for alien or irrelevant purposes, but all along kept in view and acted on grounds of educational efficiency. It has been proved that the question of dismissing married women teachers was forced upon the defendants as early as June, 1922, in consequence of the dearth of places for young teachers leaving the training colleges; that finding employment for those young teachers was a matter which might legitimately be taken into account when discussing the question of dismissal; that various remedies were proposed and discussed at the many education meetings which were held; that the dismissal of married women teachers was the remedy selected; that the matter was treated throughout the discussions from the standpoint of educational efficiency, and that the selection of the teachers for dismissal was made with the desire to minimize hardship, the earning power of

(1) [1924] 1 Ch. 483.
(2) [1922] 2 Ch. 490.
(3) [1923] 2 Ch. 372.
(4) (1925) 41 Times L. R. 669. Reversed on appeal since the trial and pending judgment, ante, p. 66.

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the husband being taken into account. The resolution to dismiss did not state any reasons. In *Dean* v. *Bennett* (1) the resolution stated reasons (which were never investigated) upon which the resolution to dismiss a Baptist minister was founded; and it was on account of the reasons stated that the resolution was held to be invalid. The present case is covered by the decision in *Price* v. *Rhondda Urban Council* (2), where reasons for the dismissal were stated in the resolution; but, as was pointed out by Eve J., the authority being entrusted with statutory powers it was to be assumed that the administrative act of dismissing teachers was done bona fide in the discharge of a statutory duty, unless it were shown to have been done ultra vires or not in good faith with the intent to keep the schools efficient or with some other alien or irrelevant purpose. In *Short* v. *Poole Corporation* (3) the evidence was not sufficient to show that the decision of the Council to dismiss the plaintiffs in that case was based upon the reasons stated in the Town Clerk's letter of May 19, 1924, and it was held that, even if it was based upon the grounds stated, they were entitled to take those reasons into consideration, as they were not irrelevant or outside the ambit of their duties as an educational authority. Further, the plaintiffs' rights depend upon and are limited by their contracts; they have no rights beyond. The plaintiffs do not allege breach of contract; and even if they could prove it, the Court would not grant specific performance of a contract for personal service nor grant relief by way of injunction in such a case. They have no rights given them under the Education Act, 1921; they hold office during the pleasure of the Authority. It is not competent for an employee of the Authority to dispute the power of the Authority to dismiss him on the ground that the power was not exercised in pursuance of the statutory duties of the Authority. The employee cannot look beyond the four corners of his contract: s. 148, sub-s. 1, of Education Act, 1921; *Price* v. *Rhondda Urban Council*. (2) It would be ultra vires of the Authority to introduce into

(1) (1870) L. R. 6 Ch. 489. (2) [1923] 2 Ch. 372.
(3) Ante, p. 66.

the contract a condition that it should not be terminated by them except upon proper statutory grounds; were it otherwise, it would be an undue encouragement of litigation. The Authority is not bound to give its reasons for dismissing a servant, and the matter cannot be further inquired into, unless it be shown that their action was ultra vires or corrupt: *Hayman* v. *Governors of Rugby School.* (1) "If upon legitimate materials which might possibly have satisfied a reasonable man desirous of doing justice they"—in this case the Council—"came to a certain conclusion . . . . it is not the office of the Court to interfere with it": *In re Fremington School.* (2) In *Reg.* v. *Vestry of St. Pancras* (3) the Authority as a statutory Authority had a discretion which it thought it had not and which consequently it never exercised. Even assuming an Authority has acted in breach of its statutory duties, that does not necessarily give a private individual a right of action, unless he prove special damage. A person injured by the breach of a statutory duty must have recourse to the statutory remedy and cannot maintain an action for damages: *Atkinson* v. *Newcastle Waterworks Co.* (4) And he has no right of action for damages incurred through mere neglect to perform a statutory duty: *Glossop* v. *Heston and Isleworth Local Board.* (5) In *Hanson* v. *Radcliffe Urban Council* (6) the plaintiff was not asking for damages for wrongful dismissal; it was only held there that she was entitled to the opinion of the Court, whether the notice of dismissal given by the defendants (who became statutory parties to the contract of service between the plaintiff and the school manager) was a valid notice. If such an action were maintainable, it would seem to follow that the Authority would be liable to an action on the part of any and every of their employees.

Luxmoore K.C. in reply. The case is covered by the principle laid down by Eve J. in *Price* v. *Rhondda Urban Council* (7), that where a body has statutory duties to perform, as in the

(1) (1874) L. R. 18 Eq. 28, 69.
(2) (1847) 11 Jur. 421, 424.
(3) (1890) 24 Q. B. D. 371.
(4) (1877) 2 Ex. D. 441.
(5) (1879) 12 Ch. D. 102.
(6) [1922] 2 Ch. 490.
(7) [1923] 2 Ch. 372, 389.

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present case, it can only validly exercise its powers for the purpose of carrying into effect those duties. It is a question of fact whether or not the Council in passing the resolution to dismiss the married women teachers had taken into account matters foreign to the question of educational efficiency: *Hayman* v. *Governors of Rugby School.* (1) The reasons for passing the resolution need not appear in the resolution itself. The evidence is that the resolution was the direct result of a debate at which it was freely discussed and insisted that married women's duties lay in their own homes. The teacher holds office at the pleasure of the Authority, but that does not relieve the Authority appointing or dismissing a teacher from having regard to his statutory duties, which oblige it to consider educational efficiency: *Price* v. *Rhondda Urban Council.* (2) The grounds upon which a dismissal is based must not be mixed grounds. In the case of a non-provided school, that was decided in *Sadler* v. *Sheffield Corporation* (3), and there can be no distinction in principle in this respect between a non-provided and a provided school.

Cur. adv. vult.

Dec. 10. LAWRENCE J. [after stating the engagement by the Council of the plaintiffs and the terms of their engagements and the notices of dismissal served upon the plaintiffs in pursuance of the resolution of the Council and the claims made in the action brought by the plaintiffs in consequence of those notices with the grounds upon which those claims were based proceeded as follows:] Since the conclusion of the trial the case of *Short* v. *Poole Corporation* (4) has been decided in the Court of Appeal, and I have had the advantage of reading a transcript of the shorthand notes of the judgments delivered in that Court. The principle there laid down appears to me to be applicable to the facts of this case, which facts much resemble those in *Short's* case. In *Short's* case the Court of Appeal decided that in order to succeed in an action such as this, the plaintiff must prove that in giving the notice terminating the engagement the Local Education

(1) L. R. 18 Eq. 28, 69.
(2) [1923] 2 Ch. 372, 389.
(3) [1924] 1 Ch. 483.
(4) Ante, p. 66.

Authority had acted either ultra vires or so corruptly or mala fide or with such an alien motive or in pursuance of such an illegitimate aim as to render the notice a nullity, but that the burden cast on the plaintiff was a heavy one. It is to be observed at the outset that *Short's* case and the present case are not like *Hanson's* case (1) and *Sadler's* case (2), nor like the other numerous reported cases, where the Legislature has thought fit for the benefit of the community to confer a power to interfere with the contractual rights or with the property of a private individual on stated grounds or for a definite purpose, and where the body, upon which such power has been conferred, has, under colour of such power, attempted to attain some collateral and alien object. Here, as in *Short's* case (3), the plaintiffs have entered into contracts for service directly with the Council, under which contracts they have agreed that the Council is to have an absolute unconditional right to terminate their engagements on giving not less than a month's written notice. It has not been suggested that these contracts (which were entered into by the Council in the ordinary course of their duties) were otherwise than fair and proper contracts, and came well within the powers of the Council as the Local Education Authority. Prima facie, therefore, the giving of the notices was intra vires. In such a case, under ordinary circumstances, the Court would never go into the motive of either party for exercising any of the contractual rights, as no action would lie, however corrupt such motive might have been. Had the plaintiffs given written notices to the Council to terminate their engagements, the Council could not have treated such notices as inoperative, because the plaintiffs had given them corruptly or mala fide. *Short's* case (3), however, is an authority for the proposition that, if one of the contracting parties is a statutory body and, therefore, can only properly exercise its powers for the purposes for which it is created, the other party to the contract has a right to question the motives which actuated the statutory body in exercising its contractua[l]

(1) [1922] 2 Ch. 490. (2) [1924] 1 Ch. 483.
(3) Ante, p. 66.

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rights; and, on proof that such motives were corrupt or male fide or otherwise alien to the objects for which it was created, to obtain a declaration that such purported exercise is null and void.

In my opinion, this decision, by which, of course, this Court is bound, disposes of the following three points taken by Mr. Upjohn on behalf of the defendants—namely, first, that this action is not maintainable, on the ground that it is, in substance, one for the specific performance of a contract of service; secondly, that the Court will not, where one party to a contract is exercising his contractual rights, inquire into the motives for the exercise of those rights, and, thirdly, that the plaintiffs are not competent parties to set up an alleged abuse by the defendants of their statutory powers, but that, in such a case, the action ought to be brought by the Attorney-General on behalf of the public concerned.

Mr. Luxmoore on behalf of the plaintiffs did not allege that the Council in giving the notices had acted corruptly or mala fide, and the plaintiff, Mrs. Harbott (who was put forward as representing herself and her co-plaintiffs), admitted in cross-examination that she believed that the members of the Council responsible for the passing of the resolution to terminate the plaintiffs' engagements had honestly thought that the question of such termination was a matter for consideration in connection with the educational efficiency of their undertaking. In these circumstances, the only question remaining for consideration, if indeed such question is open in the face of this admission, is whether in fact the resolution of the Council was passed in pursuance of some illegitimate aim and not in furtherance of its statutory object. In order to determine this question it is necessary to state, as shortly as may be, the relevant facts which emerged at the trial. [His Lordship then proceeded to give a short history of the facts from the year 1922 up to the commencement of the action as above set out and continued as follows:] One of the points taken by Mr. Luxmoore was that the Council, in resolving upon the policy of reducing the number of married women teachers in order to make room for unemployed single

women teachers, was acting under the domination of the Ratepayers' Association and was not in fact exercising its own discretion. In my opinion this is not borne out by the facts. The evidence does not make it clear whether the Association or the Council was the first to raise the question of getting rid or reducing the number of married women teachers engaged at the schools provided by the Council, and in my opinion it is not material to decide this question. Mr. Harper stated that the question had been informally discussed in committee on many occasions in connection with the finding of vacancies for applicants for posts of teachers long before the Association interested itself in the matter, whereas Mr. Pope said that the Council only took up the matter after the Association had done so, and had applied to be furnished with particulars of married women teachers in the early part of 1922. Be that as it may, I think it clearly appears from the evidence that the Association was the direct cause of the Council taking up the question effectively in the summer or autumn of 1923. There is, however, no trace of any evidence that when the Council did take up the question, it was dominated by the Association or that it surrendered its discretion to the Association; and I find as a fact that it exercised its own uncontrolled discretion in the matter.

The main point taken by Mr. Luxmoore, however, was that it appeared from the arguments used by the various members of the Council, both in Council and in committee, that the real motive of the Council for terminating the engagements of the plaintiffs was, first, that married women teachers ought to make room for unemployed single women teachers: secondly, that a married woman's place was in her own home; and, thirdly, that there should not be two salaries going into the same home; and, consequently, that the resolution passed by the Council to terminate the engagements of the plaintiffs was not passed for the purpose of securing efficiency of education, but for collateral and irrelevant purposes.

Admittedly, the question of the employment of married

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women teachers had for some time past been a vexed one in this as well as in other boroughs. It cannot be disputed that the views, honestly held and expressed by persons concerned with educational matters as to why married women teachers should not be employed, are divers, and that all of such views are considered entirely wrong by those who hold the opposite view. It is not, perhaps, to be wondered at, therefore, that when the policy of reducing the married women teachers came to be discussed by members of the Council, divergent (and what might well strike some people as wholly irrelevant) reasons were given by various members of the Council for voting and for trying to induce other members to vote for or against the adoption of the policy.

The main fact to be borne in mind in the present case is that the only object and purpose of the Council in resolving upon the reduction of the number of married women teachers was to create vacancies for those unemployed single women teachers whom the Council had assisted out of the public funds in training for the teaching profession, and whom the Council had thereby (possibly unintentionally) led to believe that posts would be found for them when they qualified. Whether such a policy is one which would commend itself to the Court is not the question which I have to determine. In favour of its adoption it was contended that, unless such posts were found, not only would the public money spent on the training of those teachers have been wasted, but also, in future, parents would in all probability be reluctant to incur the extra cost involved in training their daughters for the teaching profession, and there might again come a time when there would be an insufficient number of qualified teachers to supply the demand, in which case education would suffer. Whether this argument is sound or not is not for me to determine; at all events, the Board of Education seems to have considered that the matter was one of concern from the educational point of view, and to have suggested that the reduction in the number of married women teachers might help in the

solution of the problem. Moreover Mr. Pope, in cross-examination, admitted that the non-employment of young women, after they had qualified at the Training Colleges, and the possible effect of such unemployment upon education in the future, and the means which ought to be adopted in order to prevent such unemployment, were all matters connected with educational efficiency. He also confessed, after some hesitation, that he had in the discussions in Council and committees dealt with the question of the absorption of those young teachers as one in which the cause of education was interested, and had himself contended that it was important in the cause of education that places should be provided for these young teachers, but stated that the remedy which he advocated was the reduction of the number of pupils in the classes and the consequent creation of more classes, which would necessitate the employment of more teachers.

In considering the question to be decided, it is not unimportant to observe that the policy was not adopted by the Council in any haste, but only after many months of exhaustive inquiry undertaken by the appropriate committees. It was admitted by Mr. Pope that the question of reducing the number of married women teachers, so as to create vacancies for the unemployed single women teachers, lay at the root of the Council's action in terminating the engagements of the plaintiffs, and of the other married women teachers who had received similar notices, and that this was always present to the minds of the members who took part in the discussions at the Council and committee meetings. In these circumstances, I am of opinion that it would be entirely wrong to hold that the adoption by the Council of this policy is so alien to the powers entrusted to it as to render the steps taken to carry it out invalid and nugatory, either on the ground that such steps were taken in excess of its powers or on the ground that they were taken in pursuance of an illegitimate aim.

I now come to the arguments that a married woman's place is in her home, and that two incomes ought not to

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go into one home, arguments which were used by some of the members of the Council in support of the adoption of the policy, and upon which arguments Mr. Luxmoore laid much stress. Bearing in mind that the policy which was discussed throughout and which the Council ultimately resolved upon was not a policy of ruthlessly terminating the engagements of all married women teachers, but was the more considerate and humane policy of reducing the number of married women teachers, where this could be done without inflicting excessive hardship on any individual members of the class of teachers affected, and that, therefore, the domestic circumstances of the teachers and the means and earning capacity of their husbands were material factors in determining, not only whether the policy ought to be adopted at all, but also in determining the best method of applying it, if it should be adopted, and that, in all discussions on the subject, these two questions were more or less bound up together, I am not prepared to hold that the arguments relied upon by Mr. Luxmoore were so foreign to the matters in hand as to afford any evidence, much less conclusive proof, that the Council was pursuing some illegitimate aim. The newspaper reports of the speeches which were made at the public meetings of the Education Committee and Council, though no doubt fair enough as far as they went, were not complete reports of all that took place at the meetings. Having heard the evidence of the reporter, it is obvious that he reported such of the speeches and so much of those speeches as he thought would appeal to the readers of his paper, and it is quite possible, as Mr. Harper said, that the reports as a whole do not accurately convey to the reader what actually took place at the meetings; but, be that as it may, I am not prepared to hold that, because certain members (who were not speaking on behalf of the Council but were merely expressing their own views) used arguments which the Court might think wholly irrelevant and beside the mark, the resolution of the Council was thereby rendered nugatory and that the notices can be treated as a nullity. The truth is that, by this action, the plaintiffs are endeavouring to get the Court

to reverse a policy which the Council has adopted, and which policy is one which, in my opinion, comes within the purview of its duties as the Local Education Authority.

The evidence given on either side seems to me to be nothing more than a reiteration of the arguments for and against the adoption of the policy. If the policy does not commend itself to the majority of the electors in East Ham, they must take care that the members whom they elect at the next municipal election will reverse that policy. It is not for the Court to pronounce a decision as to the merits or demerits of the policy.

A careful consideration of the whole of the evidence has led me to the clear conclusion that the plaintiffs have entirely failed to discharge the onus which, according to the ruling of the Court of Appeal in *Short's* case (1), lies upon them, and therefore this action fails, and must be dismissed with costs.

Solicitors: *Lamartine Yates & Morgan; Wilson & Blew.*

H. C. H.

GREENBERG *v.* COOPERSTEIN.

[1925. G. 3045.]

Company—Unregistered Association—Association of more than Twenty Members — Association carrying on Business having for Object the Acquisition of Gain—Illegality—Administration of Assets—Right of Members to an Account—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 1, *sub-s.* 2.

An association with four branches was formed to obtain subscriptions from the members of each branch and to lend to members out of the fund so formed money on interest. Each fund, with its accretions of interest, was divided up periodically among the members rateably at a period of the year which differed in each branch. The association and its branches all consisted of more than twenty members. The association was not registered under any statute. Disputes having arisen, a resolution was passed by the members for the dissolution of the association, and this action was brought by three members suing on behalf of all members other than the defendants against the defendants,

(1) Ante, p. 66.

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who were the treasurer and secretary of the association, claiming administration of the assets of the association, an account of the subscriptions received by the defendants from members and of their application thereof, payment of the amount found due and other relief. The action was resisted on the ground that the association was illegal and that no relief could therefore be given :—

Held (1.), that the association was rendered illegal by the Companies (Consolidation) Act, 1908, s. 1, sub-s. 2, as being an unregistered association of more than twenty persons carrying on a business having for its object the acquisition of gain ;

(2.) That, notwithstanding this, the Court was not debarred from affording relief to the members asking for the return of money paid into the hands of agents for application for an illegal purpose by granting an account.

Shaw v. *Benson* (1883) 11 Q. B. D. 563 followed on the first point, but distinguished on the second point.

Barclay v. *Pearson* [1893] 2 Ch. 154 considered.

Wilkinson v. *Levison* (1925) 42 Times L. R. 97 and *Jennings* v. *Hammond* (1882) 9 Q. B. D. 225 distinguished.

WITNESS ACTION.

The plaintiffs were three members of a club formed in Whitechapel called the Pelham Club, and they sued on behalf of all members of the club (other than the defendants), and the defendants were the treasurer and secretary of the club. The club had been formed in or about 1909 amongst persons living in or around Pelham Street, Whitechapel, and consisted of four branches or sections known as : (*a*) The Pelham Penny Society ; (*b*) The Pelham Holiday Society ; (*c*) The Pelham Christmas Society ; (*d*) The Pelham Passover Society.

The general object of the club, which was an unregistered association, was to enable its members to pay such weekly sums measured by the number of shares taken by each member into a fund which might be available for distribution at the termination of the period denoted by the name of the particular branch and to enable members to obtain loans out of the fund meanwhile.

The only rules of the club were indorsed on the subscription cards of each branch issued to members, and, though they differed in small particulars, they were substantially to the same effect.

Rule 1 provided that the society should consist of an

unlimited number of members, and was to meet every Sunday afternoon from 1 to 4 P.M.

Rule 3 provided that all persons joining the society must conform to its rules.

Rule 4 provided that members borrowing money would be charged 1*s.* in the £ by way of interest, and that there should be repayments for each 1*l.* borrowed of 1*s.* per week. Members not repaying their loans regularly were to be fined 1*d.* for each omission on each 1*l.* borrowed.

Rule 5 provided that no member should have any loan whatever, unless he had sufficient shares to cover the amount or provided security.

The rules also provided for quarterly payments towards a management fund, and that any member might withdraw by giving fourteen days' notice in writing, if not indebted to the society for a loan.

In 1925 the club consisted of nearly 150 members, but at Easter, 1925, the defendants failed to share out the funds belonging to one of the branches, and, as a result, the members of the club passed a resolution at a general meeting held on August 12, 1925, appointing a committee to examine into the affairs of the club, and one Marks was appointed by them to examine and inspect the books of account.

He was unable to obtain much information, and on August 17, 1925, four members of the club applied to the police court for writs against the defendants on a charge of embezzlement; but upon the defendants stating that they had 250*l.* in their hands and would collect any outstanding loans and share out the funds, the charge against the defendants was ultimately dismissed.

In the meantime Marks had made a report indicating that the affairs of the club were in an unsatisfactory state, and on October 25 a general meeting of the club was held, at which some eighty members were present, and a new official committee was appointed, consisting of the plaintiffs and others, with instructions to investigate the club's affairs and to take such action as they might deem proper.

On October 26, 1925, the committee appointed Messrs.

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G. B. Howard & Son solicitors of the club, and instructed them to obtain possession of all books, papers and money. The defendants did not hand them over, but on November 9, 1925, gave notice of their intention to distribute on the following day such of the funds of the club as were in their hands, and they in fact made a rateable distribution out of the fund to the extent of about 120*l.* to those attending to receive it.

As a result of this, the committee passed a resolution on November 15, 1925, removing the defendants from their respective offices; and at a general meeting of the club held on December 6, 1925, it was resolved that the club be dissolved, and that the plaintiffs be instructed and authorized to institute proceedings for the administration of the funds and the distribution of the assets.

The plaintiffs therefore brought these proceedings claiming administration of the assets of the club; an account of the money received by the defendants from members of the club and of their application thereof; an inquiry as to any property of the club in the defendants' custody available for the benefit of members of the club; payment of the amount so ascertained; and an injunction, a receiver and other consequential relief. Since the institution of proceedings the defendants had paid 110*l.* remaining in their hands into court.

J. B. Melville and *G. G. Tomlin* for the plaintiffs. There should be an account ordered and payment into court of the money for which the defendants are found to be accountable on taking the account. Substantially the only ground on which the action is resisted is that the Pelham Club is an illegal association within the Companies (Consolidation) Act, 1908. The club was not, however, carrying on business for gain, so as to fall within the prohibition of the section; and even if it were, this would not debar the members from recovering their subscriptions.

Arthur Henderson for the defendants. The Pelham Club is an illegal association within the section. A club that makes

a practice of lending money to members is carrying on a business for gain: *Shaw* v. *Benson* (1), and no agreement connected with the illegality can be enforced: *Wilkinson* v. *Levison*. (2) All trusts affecting its funds are, therefore, void, and the law cannot be invoked against it by its members for any purpose whatever: *Hilton* v. *Eckersley* (3); *Hornby* v. *Close*. (4) Thus there can be no order for administration of the funds nor a declaratory order: *Cope* v. *Crossingham* (5); *McLuskey* v. *Cole*. (6)

[TOMLIN J. Is there not a power to pursue funds subscribed by the members of an illegal association before they have been applied for the illegal purposes?]

It is submitted not. In *In re One and All Sickness and Accident Assurance Association* (7) the particular body was held not to be an illegal association.

J. B. Melville in reply. The club is not carrying on a business for the acquisition of gain, and it is not therefore an illegal association. There is nothing in the rules to indicate an intention to carry on such a business.

[TOMLIN J. The association lends money out at interest so as to increase the amount to be divided up among its members.]

Shaw v. *Benson* (1) is distinguished. In *Wilkinson* v. *Levison* (2) and *Shaw* v. *Benson* (1) an effort was being made to recover money lent by an illegal association. This is a very different case, and even if the club were an illegal association it would not prevent its members from recovering money paid to the club's officials. In *Hornby* v. *Close* (4) the ground of the decision was that the particular body failed to bring itself within the section conferring jurisdiction. Here the plaintiffs are suing as beneficial owners of subscriptions in the hands of the defendants and claiming an account. This they are entitled to do: *Barclay* v. *Pearson* (8); and see *Reg.* v. *Tankard*. (9) In *Marrs* v. *Thompson* (10)

(1) 11 Q. B. D. 563.
(2) 42 Times L. R. 97.
(3) (1856) 25 L. J. (Q. B.) 199.
(4) (1867) L. R. 2 Q. B. 153.
(5) [1909] 2 Ch. 148.
(6) [1922] 1 Ch. 7.
(7) (1909) 25 Times L. R. 674.
(8) [1893] 2 Ch. 154.
(9) [1894] 1 Q. B. 548, 550.
(10) (1902) 86 L. T. 759. 761.

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Lord Alverstone C.J. discussing *Jennings* v. *Hammond* (1), where the trustee for an illegal association was held not to be entitled to recover on a promissory note given in respect of a loan by the society, said: "I would point out that I am by no means sure that if they had not sued on a promissory note the decision would have been the same." The note being given for an illegal consideration could not be sued upon, but there is no such taint of illegality affecting the claim for an account in this action.

TOMLIN J. This is an action by three persons, suing on behalf of themselves and all other members (except the defendants) of the Pelham Club, against the two defendants, claiming relief in the nature of an order for administration of the assets of the club, an account of the amount received from members by the defendants, and of the application thereof, a receiver, an injunction and other relief.

The so-called club is an association of persons living in the neighbourhood of Pelham Street, Whitechapel, the object of which is to provide for certain purposes funds which are divided between the members at certain periods. There were four branches of the association, called the Pelham Penny Society, the Pelham Holiday Society, the Pelham Christmas Society and the Pelham Passover Society, and the defendants, who are father and son, were the treasurer and secretary.

I have been shown the rules of two of these branches, and I understand that the rules of the other two branches are substantially the same. The chief feature of the rules is their unintelligibility, and they fail to make clear what were the organization and objects of the society. They contain no provisions as to its government or constitution. They provide however that the society is to consist of an unlimited number of members, and to meet every Sunday between 1 and 4 P.M. A weekly subscription has to be paid and a quarterly payment made for expenses of management. The rules provide for members borrowing, and it is agreed on

(1) 9 Q. B. D. 225.

both sides that the practice was to allow members to borrow up to the amount of the subscriptions standing to their credit without security, and to borrow further on providing security, and that interest was charged at the rate of 1*s.* per 1*l.* for twenty weeks. One of the sets of rules contains a rule that members who had not borrowed were to be liable to a fine. The rules also provided for sharing out the funds at certain periods.

The first thing I have to consider is what is the position of an association of this kind? The Companies (Consolidation) Act, 1908, s. 1, sub-s. 2, provides: "No company, association, or partnership consisting of more than twenty persons, shall be formed for the purpose of carrying on any other business" —that is, business other than a banking business—"that has for its object the acquisition of gain by the company, association, or partnership, or by the individual members thereof, unless it is registered as a company under this Act, or is formed in pursuance of some other Act of Parliament. . . . ." This was admittedly an association consisting of over eighty members, and it therefore exceeded the limit mentioned in the section.

The question then is, whether it was carrying on any business, and if so, whether it was a business having for its object the acquisition of gain by the association or its individual members. It has, I think, been laid down that the "acquisition of gain" does not necessarily mean the acquisition of a commercial profit. It is sufficient that the association carries on a business for the purpose of obtaining payments, and it is not necessary that the business should result in a commercial profit at the end of the accounting period. It is, I think, impossible, in view of the admitted practice, to construe the rules as other than rules regulating an association which carries on the business of lending money to its members for the purpose of securing that at the end of each accounting period there shall be a larger fund available for distribution than the sums contributed. In these circumstances I cannot come to any other conclusion than that the association is an illegal association under the sub-section.

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I may say that while that is my own view, I should, whatever my personal view, have felt a difficulty in deciding otherwise, having regard to the judgment of Brett M.R. in *Shaw* v. *Benson*. (1) That was a case where there was a loan society of a similar character, and it was held to be illegal under a corresponding section of the Companies Act, 1862, and Brett M.R. in that case said: "Then does it carry on 'a business'? The answer to that question must depend upon the inference to be drawn from the facts before us, and upon the subject matter with which the society was intended to deal. The object of the society is stated in rule 2; the object is to form a fund; that is not a 'business.' That fund is to be devoted to two purposes: one purpose is that money may be advanced out of it to enable shareholders to build or purchase a dwelling-house or other buildings; the other purpose is to lend money to the shareholders 'on approved personal security.' Therefore one of the objects of the society is to lend money, and 5 per cent. interest is to be charged on all moneys advanced by the society. If a man lends money to a friend on one occasion even at interest, he is not carrying on a 'business'; but if he forms a fund of 1000*l.* and from time to time lends money out of it, he is then lending money to different persons at interest. Every one would say that this is the 'business' of lending money, for it is carried on so long as any profit can be made. The object is to lend money at intervals upon successive contracts; therefore the Thornhill Arms Society carries on a 'business.' A society is not within s. 4 of the Companies Act, 1862, unless its business has for its object the 'acquisition of gain.' But the Thornhill Arms Society lends money at interest; therefore it is an association carrying on a 'business,' having for its object the 'acquisition of gain.' Perhaps the association itself does not 'gain' any profit by the 'business,' but the individual members do, and this seems to be sufficient to bring the society within the prohibition of the section. It may be said that the words in s. 4 'by the individual members thereof' mean 'by *all* the individual members thereof.' But

(1) 11 Q. B. D. 563, 570.

if that were the true construction of the enactment, a mutual marine insurance would not be within its terms; and when *In re Padstow Total Loss and Collision Assurance Association* (1) was before this Court, it was held that an association of that kind is within the prohibition of s. 4, and if it is not registered under the statute it cannot be recognized as having any legal existence. The decision which I have mentioned shows that the Thornhill Arms Society is within the enactment, for if each member of an association may acquire a gain, that is sufficient to bring it under the operation of the section."

Having come then to the conclusion in the present case that the Pelham Club is an illegal association, I have next to consider what relief can be given in a case of this sort. [His Lordship then stated the facts giving rise to the present action.] I do not myself believe that the law is so powerless that when money is in the hands of persons who have received it for application for an illegal purpose, it cannot protect the contributors or enable them to recover it before it has been applied for this illegal purpose. The matter was considered by Stirling J. in *Barclay* v. *Pearson* (2), when he said that competitors in an illegal competition could obtain a return of their contributions; and I think the same view was suggested by Lord Parker in *In re One and All Sickness and Accident Assurance Association.* (3) There he decided that the particular association was not an illegal association within the section, but he said that even if it had been, he should not have come to the conclusion, without further consideration, "that those who received these moneys from persons invited to subscribe their moneys, were not liable to account for those moneys." *Wilkinson* v. *Levison* (4); *Jennings* v. *Hammond* (5); and *Shaw* v. *Benson* (6) were all cases where an illegal association was seeking to recover money lent by it; and it was necessarily held that the association being illegal the contract with it could not be enforced by it. It

(1) (1882) 20 Ch. D. 137.
(2) [1893] 2 Ch. 154.
(3) 25 Times L. R. 674, 675.
(4) 42 Times L. R. 97.
(5) 9 Q. B. D. 225.
(6) 11 Q. B. D. 563.

TOMLIN J. 1926 GREENBERG v. COOPER-STEIN.

is a different case where those who have subscribed money for an illegal purpose come requiring the agents in whose hands it is and who were to apply it for that purpose and have not done so, to return it to them. I am happy to think that the law is not so feeble that it cannot protect the subscribers by ordering an account; but in saying this, I am expressing no opinion as to what will take place after the account has been taken and by what means if any the defendants may discharge themselves of the money they have received. I prefer to leave that entirely open for discussion hereafter.

[After some discussion the defendants gave an undertaking to pay into court any money which at any time came into their hands or the hands of either of them in respect of money received from any subscriber to the club. His Lordship then made an order for an account as from December 31, 1923, and directed an inquiry who were the subscribers to the club in the years 1924 and 1925 respectively, the inquiry not to be proceeded with without the leave of the Court.]

Solicitors for plaintiffs: *G. B. Howard & Son.*
Solicitors for defendants: *Saunders, Sobell & Co.*

H. C. G.

PRESTON *v.* RAPHAEL TUCK AND SONS, LIMITED.

TOMLIN J.

1926

March 24, 25, 26, 31.

[1925. P. 434.]

Copyright—Altered Drawing—Reproduction and Sale as Calendar—Altered Drawing unsigned—Distinctive Style of Artist—Production and Sale "as or for the unaltered work" of the Artist—Fine Arts Copyright Act, 1862 (25 *&* 26 *Vict. c.* 68), *s.* 7.

The Fine Arts Copyright Act, 1862, provides: "No person shall do or cause to be done any or either of the following acts; that is to say, ... Fourthly, where the author or maker of any painting, drawing, or photograph . . . . made either before or after the passing of this Act, shall have sold or otherwise parted with the possession of such work, if any alteration shall afterwards be made therein by any other person, by addition or otherwise, no person shall be at liberty during the life of the author or maker of such work, without his consent, to make or knowingly to sell or publish, or offer for sale, such work or any copies of such work so altered as aforesaid, or of any part thereof, as or for the unaltered work of such author or maker." The purchasers of two water colour drawings and the copyright therein first reproduced them unaltered in the form of calendars with the artist's name upon them. Three years later they reproduced the drawings for the same purpose altered by cutting off portions of the margins and making them round or oval instead of square and by changing the colour and pattern of the backgrounds. As so reproduced, they did not bear the artist's name. In an action by the artist for an injunction and penalties under this section:—

Held, that the purchasers had not committed a breach of the section. In order to bring such a case within the words "Knowingly to sell or publish . . . . any copies of such work so altered as aforesaid," there must be a selling or publishing in conditions in which, to the knowledge of the seller or publisher, there is made either expressly or by necessary implication a representation that the work as published is the unaltered work of the artist. No such necessary implication arose from the fact that the artist had so distinctive a style that to some persons the work would suggest the name of the artist.

The defendants alleged by way of counterclaim that the plaintiff had infringed their copyright in another work acquired by them from her by producing a figure of the same type as one of the figures in the work sold to them.

Held, that there had been no infringement.

The circumstances in which an artist might by reproducing a particular type he had created infringe copyright considered.

WITNESS ACTION.

The plaintiff, Chloe Preston, was an artist and the author of two original drawings called "A Patchwork Picture"

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and "The Spotted Horse," and in March, 1921, she sold the two drawings and the copyright therein to the defendants, who reproduced and sold them unaltered in the form of calendars. Both reproductions had on them the name of the artist.

In September, 1924, the defendants, without the plaintiff's consent, reproduced the drawings altered by cutting off portions of the margins and making them round or oval instead of square, and by changing the colour and pattern of the backgrounds. These reproductions were published and offered for sale as calendars under the names "A Patchwork Quilt" and "Tally Ho," and no longer bore the name of the artist.

In these circumstances the plaintiff brought this action claiming an injunction to restrain the defendants from making publishing selling or offering for sale any copy or copies of the altered drawings as and for her unaltered work; and penalties under the Fine Arts Copyright Act, 1862, s. 7.

She claimed that, although the reproductions of the altered works did not bear her name, they would be readily recognized by many as her work by reason of its distinctive style and character, and would be taken to be her unaltered work.

A counterclaim was made by the defendants in respect of another artistic work of the plaintiff called "Floreat Etona," which they had purchased at an exhibition of the plaintiff's work in January, 1923, with the copyright therein. The defendants alleged that the plaintiff had infringed the defendants' copyright by producing in January, 1924, one of the four figures in the picture and selling the copyright in it to another firm. The further facts as to the alleged infringement appear in the judgment. They claimed an injunction to restrain the plaintiff from infringing their copyright and damages.

There was a further question raised by way of counterclaim which does not call for report.

Macgillivray for the plaintiff. The defendants have committed a breach of s. 7, cl. 4, of the Fine Arts Copyright Act,

1862, by knowingly publishing and offering for sale the altered works of the plaintiff as her unaltered work: *Carlton Illustrators* v. *Coleman & Co.* (1) It is true that the plaintiff's name does not appear on the altered works, but her style is distinctive and well known to the public, and will be recognized, and any one doing so will at once assume that it is her unaltered work.

Again the single figure sold by the plaintiff, of which the defendants complain as an infringement of their copyright in "Floreat Etona," differs substantially from the corresponding figure in that picture. All that the plaintiff did was to reproduce a type invented by her, and by the Copyright Act, 1911, s. 2, sub-s. 1 (ii.), the author of an artistic work, who is not the owner of the copyright, may use any sketch or study made by him for the purposes of the work "provided that he does not thereby repeat or imitate the main design of that work." There is no infringement within s. 1, sub-s. 2. The taking of the mere conception of this single figure is no infringement, seeing that it is expressed by a work that varies substantially from the original figure: *Hanfstaengl* v. *Baines & Co.* (2); *McCrum* v. *Eisner*. (3)

Sir A. Colefax K.C. and *Trevor Watson* for the defendants. No offence has been committed by the defendants within s. 7, cl. 4, of the Act of 1862. The provisions as to penalties at the end of the section show that the offence is for an altered work to have been "fraudulently or falsely ascribed" to the artist. Here the reproductions of the altered works were "ascribed" to no one, for they were sold without the artist's name upon them. There is no offence in making a copy of an altered work, but only in publishing or selling it "as or for the unaltered work" of the artist. Sect. 7 is a penal section and must be construed strictly. It cannot seriously be suggested that if a publisher publishes the altered work of an artist whose type of work happens to be well known to the public or a section of it, he can be described as publishing it "as or for the unaltered work" of the artist.

(1) [1911] 1 K. B. 771. (2) [1895] A. C. 20, 24.
(3) (1917) 117 L. T. 536.

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Even if the style of the artist were recognizable, what right is there for the persons recognizing it to assume that it is an unaltered work, especially in articles of commerce such as Christmas cards and calendars? The section cannot be applied to anything so abstract as style. It is submitted that s. 7, cl. 4, contemplates the doing of something fraudulent. Further "ascribed" has a limited meaning, and must not be confused with "attributed." There must be an ascription either by placing on the altered work the artist's name or some index showing authorship: e.g., Whistler's butterfly.

The defendants' counterclaim for infringement is really a matter for the judge to determine after seeing the original picture and the alleged infringement. His eye for this purpose is as good as that of any witness. What is complained of here falls within the Copyright Act, 1911, s. 1, sub-s. 2. No authority is really helpful on this issue. It is said that the plaintiff has only reproduced a "type," but even so she cannot be entitled to reproduce something which is a colourable imitation of a sold copyright.

Macgillivray in reply. There is nothing in the use of the word "ascribe" to prevent the Court holding that the reproduction of an altered work recognizable by reason of its style as the work of a particular artist is an offence under the section. It is sufficient there should be in the published work something that conveys a message to a portion of the public that it is the work of the particular artist, while in fact it is an altered work.

[TOMLIN J. On that view it might be impossible ever to put out the altered work of an artist in his lifetime.]

Not without some explanatory label.

With regard to the question of infringement, the licence used by the plaintiff is exactly what the Copyright Act, 1911, s. 2, permits. In any case the evidence of the plaintiff is that she painted the alleged infringement without referring even to any study for "Floreat Etona." There was a mere reproduction of a type, but with very clear differences from the original figure. Copyright is only the exclusive right

of making copies, and confers no monopoly: *Corelli* v. *Gray*. (1)

Cur. adv. vult.

March 31. TOMLIN J. delivered the following written judgment. This is an action by Miss Chloe Preston, an artist, to restrain the defendants, who are art publishers, from publishing in alleged contravention of s. 7 of the Fine Arts Copyright Act, 1862, certain calendars which contain altered versions of works of the plaintiff, the copyright in which has been purchased by the defendants.

The plaintiff painted two pictures called "Patchwork" and "The Spotted Horse," the copyright in which she sold to the defendants, who published them as calendars. The defendants have also published as calendars altered versions of these pictures. On the calendars with the pictures as painted by the plaintiff her name appears. On the others her name does not appear. The alterations which have been made are substantial. In each case a square picture surrounded by a decorative border has been altered by being cut down to a round without any border, thus altering the general scheme of the composition. Further, the decorative backgrounds have been replaced by a black background, and there are other minor alterations in one or other of the pictures.

The section provides as follows: "No person shall do or cause to be done any or either of the following acts; that is to say, first, no person shall fraudulently sign or otherwise affix, or fraudulently cause to be signed or otherwise affixed, to or upon any painting, drawing, or photograph, or the negative thereof, any name, initials, or monogram; secondly, no person shall fraudulently sell, publish, exhibit, or dispose of, or offer for sale, exhibition, or distribution, any painting, drawing, or photograph, or negative of a photograph, having thereon the name, initials, or monogram of a person who did not execute or make such work; thirdly, no person shall fraudulently utter, dispose of, or put off, or cause to be uttered

(1) (1913) 29 Times L. R. 570.

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or disposed of, any copy or colourable imitation of any painting, drawing, or photograph, or negative of a photograph, whether there shall be subsisting copyright therein or not, as having been made or executed by the author or maker of the original work from which such copy or imitation shall have been taken; fourthly"—and this is the relevant provision—"where the author or maker of any painting, drawing, or photograph, or negative of a photograph, made either before or after the passing of this Act, shall have sold or otherwise parted with the possession of such work, if any alteration shall afterwards be made therein by any other person, by addition or otherwise, no person shall be at liberty, during the life of the author or maker of such work, without his consent, to make or knowingly to sell or publish, or offer for sale, such work or any copies of such work so altered as aforesaid, or of any part thereof, as or for the unaltered work of such author or maker." Then the section proceeds to provide for a penalty for every offender, and then continues: "All such copies, engravings, imitations, or altered works shall be forfeited to the person, or the assigns or legal representatives of the person, whose name, initials, or monogram shall be so fraudulently signed or affixed thereto, or to whom such spurious or altered work shall be so fraudulently or falsely ascribed as aforesaid: Provided always, that the penalties imposed by this section shall not be incurred unless the person whose name, initials, or monogram shall be so fraudulently signed or affixed, or to whom such spurious or altered work shall be so fraudulently or falsely ascribed as aforesaid, shall have been living at or within twenty years next before the time when the offence may have been committed." Then there is a provision in the following section which enables the penalties to be recovered by action. The language of this section is difficult to construe. It has only once been considered by the Court. Channell J. in *Carlton Illustrators* v. *Coleman & Co.* (1) said: "The word in this clause is 'knowingly,' not 'fraudulently,' and therefore to bring a case within cl. 4 there must be knowingly

(1) [1911] 1 K. B. 771, 779, 780.

a publishing of the altered work as or for the unaltered work of the author or maker." Again he says: "To come within the enactment an alteration must be a material alteration having regard to the object with which the enactment was passed; and that which would be material in that sense would be an alteration which might affect the credit and reputation of the artist. To my mind that is what is prohibited. I do not think that it would be necessary to find in any particular case that the alteration had affected the character and reputation of the artist; it is sufficient if the alteration is of such a character that it might affect his character and reputation." Again he says: "I can quite appreciate that an artist might say that if he had understood that his drawing was going to be put into the form of a coloured poster he would have worked out a different style of drawing and made it appropriate for that purpose. It may be true that in the majority of cases the publication of a drawing which has been put into the form of a coloured poster with the artist's name upon it in such a way as to represent that he is responsible for the poster would be an alteration within the meaning of cl. 4. One must remember that the owner of the copyright has an undoubted right, subject to the provisions of this clause, to make any alteration he pleases in the drawing, provided that he thereby makes no false representation to the public as to the authorship of the drawing."

In this case I think the alterations affect the whole composition of the works, and are of such a character that if the altered works have been published as or for the unaltered work of the plaintiff, there has been a breach of the section.

Now the plaintiff's name has not appeared on or in connection with the altered work, nor have the defendants in any way expressly represented that the altered works are the plaintiff's, but it is said that the plaintiff's style is of so distinctive a character that anyone seeing the altered works would recognize them as the plaintiff's, and believe them to be wholly hers.

I think there is in many of the plaintiff's productions a

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measure of distinctiveness which would be recognized by those familiar with the plaintiff's work, but it does not follow that this is sufficient to bring what has been done within the section. The right of the owner of the copyright to do what he likes with his own is limited only by the terms of the section. The section is a penal section, and must be construed strictly. I think that to satisfy the words "knowingly to sell or publish any copies of such works so altered as aforesaid as or for the unaltered work of such author or maker," there must be found a selling or publishing in conditions in which, to the knowledge of the seller or publisher, there is made, either expressly or by necessary implication, a representation that the author is the author of the work sold or published in the form in which it is sold or published. There are not, in my opinion, any such conditions here. There is no express representation at all, nor is it suggested that there is any representation arising by implication unless it is to be implied from the mere fact that, to some minds, the work may suggest the name of the plaintiff. I do not think that such an implication is possible. In the first place, no one is able to say more than that the plaintiff often displays a general style not capable of any exact description or definition, but recognizable by those familiar with it, and, at most, it can only be a matter of opinion whether a particular work suggests the plaintiff's style or not. It certainly will not do so to all and sundry, and it is difficult to see why, even to those minds which recall the plaintiff's name, there is necessarily suggested the inference that what is seen is an unaltered work of hers, especially where the thing presented is part of an article of commerce such as a calendar. I do not think that the defendants desired or intended to produce upon the minds of the public, or that they knew that what they were doing would produce on the minds of the public, or that there is any evidence that they did, in fact, produce on the minds of the public, the impression that the round pictures were the unaltered works of the plaintiff.

In those circumstances I think the case is not within the section, and that the action must fail.

As to the counterclaim, there are two claims. The first claim is that the figure of a boy designed by the plaintiff, the copyright in which has been sold by her to a firm other than the defendants, for use by them as a cut out figure for a calendar, is an infringement of copyright in a picture called "Floreat Etona" painted by the plaintiff, and purchased with the copyright therein by the defendants. The picture, the copyright in which is alleged to have been infringed, was painted by the plaintiff towards the end of 1922, and is called "Floreat Etona." It represents a scene at Lord's Cricket Ground, at the Eton and Harrow match, and attempts to portray, by means of four figures—namely, three Eton boys, and one Harrow boy—the sentiment of rivalry characteristic of the occasion. The alleged infringement consists of the figure of a boy of undetermined school origin which is said to reproduce the figure of the Harrow boy in the picture. I am satisfied by the plaintiff's evidence that the alleged infringing figure was produced by her as an independent sketch, and was not a copy of, or intended to reproduce, the single figure of the Harrow boy in "Floreat Etona." Further, an examination of the two figures side by side makes it apparent that they are independent drawings, though there is a similarity between the two figures, due in the main to the fact that the plaintiff in drawing school boys has evolved a particular type which is apparent in the several pictures of school boys drawn by her from time to time. Now it may well be that an artist who produces a type of this kind may, even when making an independent sketch, produce unconsciously something so closely resembling a previous picture of his own as to infringe the copyright in the previous picture, but where, as here, the copyright in part only of the previous picture is alleged to be infringed, it is material, in judging infringement, to consider the bearing of such part in relation to the picture as a whole. The figure complained of here contains nothing to identify the boy as representing the product either of Eton or of Harrow, none of the insignia of either school are present in the figure, and, in spite of a superficial similarity between the two figures, the alleged

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infringing figure does not seem to carry, and indeed cannot, in its isolation, carry any of the suggestion intended to be conveyed by the single figure of the Harrow boy in "Floreat Etona." In my judgment there is no infringement. [His Lordship then dealt with the second claim of the defendants, and continuing said:] I think, therefore, that the counterclaim fails. The result is the action and counterclaim must each be dismissed with costs, and there will be the usual set off.

Solicitors for plaintiff: *George C. Carter & Co.*
Solicitors for defendants: *Morley, Shirreff & Co.*

H. C. G.

Distinguished. *Re* COLLINS (AN INFANT). [1950] 1 All E.R. 1057.

Considered. *In re* COLLINS [1950] 1 Ch. 498

C. A. 1926 EVE J. *Feb.* 3, 4; *March* 3. C. A. *April* 23.

In re THAIN (AN INFANT).

In re M. M. THAIN.

THAIN *v.* TAYLOR.

[1925. T. 1299.]

Infant—Custody—Parental Rights—Child brought up from Infancy by Relatives—Delivery up to Father—Welfare of Infant first and paramount Consideration—Custody of Children Act, 1891 (54 & 55 *Vict. c.* 3), *s.* 3—*Guardianship of Infants Act,* 1925 (15 & 16 *Geo.* 5, *c.* 45), *s.* 1.

A father, who was employed in the Royal Air Force when his daughter was born, and whose wife died shortly afterwards in 1919, had no suitable home for the infant, and accepted the offer of Mrs. and Mr. J. (the married sister of his late wife and her husband) to take charge of her and bring her up with their own two children as one of the family. The father contributed towards the maintenance and all the other requirements of the child. In 1922 he greatly improved his position in life and married again. Just before so doing he confirmed by letter the previous arrangement with Mrs. J. and her husband, and agreed that the child should remain with them "until she wishes to leave of her own accord." In 1925, having then obtained a suitable home, the father desired to get back his child, then nearly seven years old. This was refused by Mrs. and Mr. J. The infant then, by her next friend, issued a summons asking (inter alia) that she might be made a ward of Court, and that Mrs. and Mr. J. might be appointed guardians of the person and have the custody of the infant given to them during her minority. No suggestion of unfitness or incapacity was made against the father:—

Held, by Eve J., on the evidence, that the father had never surrendered

his parental right, and that it was the well settled practice that the claim of a father must prevail, unless the Court was judicially satisfied that the welfare of the child required that the parental right should be superseded: *In re O'Hara* [1900] 2 I. R. 232, 240, where the rule was laid down.

Held, therefore, that as there was no suggestion of unfitness in the father in the present case and the rule did not state that the welfare of the infant was to be the sole consideration, but only the paramount consideration, which contemplated the existence of other conditions, the parental right of an unimpeachable parent stood first, and an order must be made for the delivery up of this child to her father.

On appeal:—

Held, that the question of the custody of the infant was entirely a matter within the discretion of the judge to be exercised judicially, and that Eve J. having applied the correct principles of law there was no ground for interfering with his discretion.

Held, also, that s. 1 of the Guardianship of Infants Act, 1925, introduced no new principle of law, but merely enacted the rule which had hitherto been acted upon in the Chancery Division.

ADJOURNED SUMMONS.

The plaintiff in the action was Margaret Louise Thain, an infant suing by Arthur Basil Adams, her next friend, and the defendants were Nellie Louise Taylor (a married woman and maternal aunt of the plaintiff) and William Arthur Thain, father of the plaintiff. Both these defendants were trustees of the will of the infant's mother, Margaret Mary Thain. Before the commencement of this present action proceedings had been taken in May, 1925, in the King's Bench Division, by the father of the infant for a writ of habeas corpus for the delivery of his child. Talbot J. made an order that a writ be delivered to the person having the present custody of the child to deliver her up to her father. On appeal this order was set aside by a Divisional Court. On an appeal by the father to the Court of Appeal in October, 1925, against this decision, it was pointed out to the Court that the present proceedings in the Chancery Division before Romer J. had been commenced, and it was accordingly ordered that the appeal should stand over generally with liberty to apply, the question of the custody of the infant to be dealt with by Romer J. in the Chancery action, the said judge to be at liberty to deal with the costs in the Court of Appeal and in the King's Bench

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Division, if willing to do so. The matter now came before Eve J. on an originating summons taken out on August 11, 1925, on behalf of the infant plaintiff by her next friend, whereby it was sought to obtain the following relief: (1.) that the infant might become a ward of Court; (2.) that directions might be given for her maintenance and education; (3.) administration of the estate and execution of the trusts of the will of Margaret Mary Thain, deceased; and (4.) that Eliza Beatrice Llewellyn Jones, the maternal aunt of the infant, and her husband, Alfred Bruce Llewellyn Jones, of Gelly Gron, Newport, Monmouth, might be appointed guardians of the person of the infant, and that the custody of the infant might be given to them during her minority. The defendant, W. A. Thain, required an order giving him the custody of the child.

Under the will dated March 27, 1919, of Margaret Mary Thain, the infant's mother, her estate was settled in the events which had happened for the benefit of the plaintiff, her infant child, on attaining twenty-one or marrying under that age. The question raised turned upon the arrangement come to in 1919, when the father first gave the infant into the care of Mr. and Mrs. Jones at the time of his first wife's illness and death, and subsequently confirmed it on his second marriage, and whether he had relinquished his parental rights by his actions.

Numerous affidavits were read on both sides and also the correspondence between the parties. By a letter of July 5, 1922, written by Mr. Thain to Mrs. Jones just before his second marriage he said, speaking of his child: "I quite agree that she shall remain with you until she wishes to leave of her own accord. Yet I hope that you will let me see her should I pass that way again."

The facts relating to the position of the father and the difficult circumstances in which he was placed by the death of his wife in 1919 are taken from the judgment of the Court as follows:—

"The parents of the child were married in 1911; in 1915 the father, theretofore Professor of Engineering at

the Royal Agricultural College, Cirencester, enlisted in the Aeronautical Inspection Department of the Royal Air Force, and in August, 1918, the mother, whose nerves and health had been much upset by her presence in London during some of the air raids, went to reside with her sister, Mrs. Jones, in Newport, Monmouth. She left there for a few weeks for her confinement, which took place on April 29, 1919, at the house of her other sister, Mrs. Taylor, who resides at Aberavon. At that time and for the remainder of the joint lives of the father and the mother the father was stationed at Cardiff, and in May, 1919, he, with his wife and child, went to reside with Mr. and Mrs. Jones. The wife, who unfortunately suffered from fever after the birth of the child, became mentally affected and unfit to look after the child. Early in December she died in very distressing circumstances. The husband, in July, had purchased and furnished a house in Newport, but owing to the state of his wife's health they had never been able to move into it. On her death he was faced with the alternative of taking his eight months' old daughter to this house or of finding another home for her. Either alternative would have involved committing her to the care of strangers, as he had no female relative of whose services he could avail himself. In these circumstances, says the father, Mr. and Mrs. Jones came forward and offered to take charge of the child, and that offer he gratefully accepted. According to the evidence of Mr. and Mrs. Jones, their offer to take the child was made in the lifetime of the mother on an occasion when the father and mother were considering whether it would not be advisable to find a home for the child elsewhere than with her mother. But this divergence in the evidence is of no moment, for it is quite clear that all parties recognized then, and still recognize, that it was after the death of his wife that the father was brought face to face with the problem of providing for the care of his little girl. There can be no doubt that the offer of Mr. and Mrs. Jones incorporated a promise on their part to bring the child up as one of their own, and it may well be, as they say, that they insisted that she was not to be

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taken away when she grew older and became companionable, but the father denies that he ever agreed that his daughter was to be brought up, cared for, maintained and educated as one of their own children to the exclusion of his own natural rights as a father, and the lady (Mrs. Taylor) who deposes to the existence of 'a clear and definite understanding' to that effect gives no evidence that she was ever present when any such understanding was come to. She is merely repeating something which Mrs. Jones must have told her. Nor, indeed, has the conduct of the parties been consistent with the understanding alleged, for the father constantly visited the child, travelling down at week-ends and whenever he had leave, and has throughout paid to Mrs. Jones 12*s.* 6*d.* a week towards her maintenance, and in addition discharged every item of expenditure incurred by Mr. and Mrs. Jones on behalf of the child. In the four years ending in December, 1924, these latter payments reached a total of about 366*l.*"

The summons came on for hearing before Eve J. on Feb. 3, 1926.

Hawke K.C. and *D. D. Robertson* for the summons. The child's welfare is the material element to be considered in determining to whom the custody should be entrusted. In the circumstances of this case it is not for the true welfare of so young a child that the existing conditions should be disturbed. An agreement had been come to in 1919 between the father and Mr. and Mrs. Jones that they should have the custody of this little infant, so that she might be brought up as a member of their family of two children, and without any obligation on their part to consult the father in connection with the upbringing or education of the child, who was not to be taken away until she herself desired to leave. This arrangement was confirmed by a letter from the father on July 5, 1922, just before the second marriage took place. It was a deliberate surrender of the natural rights which a father has : *Brooks* v. *Blount.* (1) There is, however, no suggestion made of unfitness or

(1) [1923] 1 K. B. 257.

incapacity against the father, or any desire on the part of Mr. and Mrs. Jones to influence the child in any way against her father. But it is manifest that the child, who is now at school in Newport and is of a very happy disposition, would be grievously distressed at being suddenly removed from her present home, which is the only one she has ever known. The Court, therefore, in the exercise of its discretion will, it is submitted, consider the paramount welfare of the child and appoint Mr. and Mrs. Jones as guardians until her majority.

Wilfrid Hunt for Mrs. Taylor, the first trustee of Mrs. Thain's will.

Gover K.C. and *L. W. Byrne* for the second defendant, the father of the infant. The welfare of the child is no doubt one of the first considerations for the Court. But the father's right to the custody of his child has always been recognized and supported by the Courts, unless some unfitness or incapacity is alleged against him. In the present case there is nothing of that sort alleged. His duties in the Air Force compelled the father to be much away, travelling long distances, and when the child was born and his wife died soon after he had no proper home to provide for her, and was glad to accept the offer of Mr. and Mrs. Jones. He visited the child as often as he could get away from his work, and contributed to her expenses in every way. He denied that he ever surrendered his right to get the child back, but at one time no doubt contemplated her remaining longer with the applicants. He was entitled to change his mind as to the time when he should require to take the child back. He was anxious to have the child now that he had a suitable home at Hampstead and a school close by. He would always be most grateful to Mr. and Mrs. Jones for their care of his child, and would allow her to go for a visit to them during the school holidays.

D. D. Robertson in reply.

Cur. adv. vult.

March 3. EVE J. The primary object of this summons is to obtain an order committing to Mrs. Llewellyn

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Jones and her husband the custody of the infant, Margaret Louise Thain. She is nearly seven years old, and from her very earliest infancy down to the present time she has lived with Mr. and Mrs. Jones, and been brought up with their own two children and as a member of their family. But she is the only child of her father, and as he is now in a position to provide her with a permanent and suitable home, he desires to enforce his right to her control and custody. It is happily a case in which no suggestion of unfitness on either side is involved, and I am satisfied the child will be as well cared for and be the object of as much solicitude in the one home as in the other. In these circumstances, according to well settled practice, the claim of the father must prevail, unless the Court is judicially satisfied that the welfare of his child requires that the parental right should be superseded. FitzGibbon L.J. in *In re O'Hara* (1) states the rule thus: "Where a parent is of blameless life, and is able and willing to provide for the child's material and moral necessities, ... the Court is, in my opinion judicially bound to act on what is equally a law of nature and of society, and to hold (in the words of Lord Esher) that 'the best place for a child is with its parent.'" The main ground upon which it has been argued that this rule should be departed from in the present case is the allegation that the father shortly after the infant's birth entered into an agreement with Mr. and Mrs. Jones that they were to be allowed to have the sole custody of the child, and to bring her up as one of their own children without being under any obligation to consult the father in any matter connected with her upbringing, and that on the occasion of his second marriage in 1922 he recognized and confirmed this agreement. It was contended that the father thereby deliberately surrendered all his parental rights in favour of Mr. and Mrs. Jones, and abandoned all claim to the custody of the child or to participate in directing her upbringing and education, religious and otherwise. I do not pause to examine whether the Court would

(1) [1900] 2 I. R. 232, 240.

recognize the validity of any such arrangement, for no such agreement has been established by the evidence. What is proved may be stated as follows. [His Lordship stated the facts as set out above.]

One cannot visualize Mr. Thain's position at the end of 1919—a widower with an infant daughter eight months old —burdened with a furnished house into which he had never been able to move, and which had become a still greater burden by reason of his impending transfer from Cardiff to duty in London, and without a female relative to come to his aid, without recognizing that he did what was best for his child in committing her to the care of his late wife's relatives, and even if the evidence were much stronger than it is I should be slow indeed to hold that a parent so circumstanced and so acting ever contemplated any surrender of his paternal rights.

In 1922 Mr. Thain's position had greatly improved; he had, as he puts it, "escaped the axe and been promoted to a more responsible position," and in July of that year he married his present wife. Before the marriage he wrote letters to Mr. and Mrs. Jones, wherein he assented to the continuation of the then subsisting arrangement, and undoubtedly used language from which they were justified in concluding that he had no intention of taking his child away, but was willing that she should remain with them until she might herself desire to leave, and that to this extent he was treating the arrangement as a permanent one. But, as he urges in para. 5 of his affidavit filed on November 25 last, the occasion and circumstances on and in which those letters were written must not be overlooked, and I do not understand how the expressions used can be construed as anything more than statements of his then intentions. In my opinion they do not preclude him from now insisting on his rights, and however disappointing or even distressing it may be to Mr. and Mrs. Jones to learn that he has changed his mind, and to part with the child they have come to regard as their own and for whom I doubt not they entertain the strongest affection, I do not think they can successfully assert a claim

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to retain her founded upon anything which took place between them and her father in 1919 and 1922. Nor in justice to the father can his change of mind be dismissed as altogether capricious. His present position is materially different from what it was. His second marriage has turned out to be a happy one, but no child has been born of it. His wife is willing to take to his daughter as her own; he has an assured position, a suitable and comfortable home, and his only child is now of an age when naturally he wishes for the happiness of her companionship. Grateful as he must always be to Mr. and Mrs. Jones for the affectionate care which they have bestowed upon his child, can it be a matter of surprise that he wishes without delay to put an end to a condition of things in which his only child regards and, as I gather, addresses another man as her father, and must, if matters continue as they are, be even more and more detached from him? I think not.

It is said that the little girl will be greatly distressed and upset at parting from Mr. and Mrs. Jones. I can quite understand it may be so, but, at her tender age, one knows from experience how mercifully transient are the effects of partings and other sorrows, and how soon the novelty of fresh surroundings and new associations effaces the recollection of former days and kind friends, and I cannot attach much weight to this aspect of the case.

As I said at the commencement of my judgment, I am satisfied that the child will be as happy and well cared for in the one home as the other, and inasmuch as the rule laid down for my guidance in the exercise of this responsible jurisdiction does not state that the welfare of the infant is to be the sole consideration but the paramount consideration, it necessarily contemplates the existence of other conditions, and amongst these the wishes of an unimpeachable parent undoubtedly stand first. It is my duty therefore to order the delivery up of this child to her father.

G. M.

C. A. The plaintiff appealed. The appeal was heard on April 23, 1926.

Maugham K.C. and *D. D. Robertson* for the appellant. It is submitted that it is not in the interests of the infant that she should at the present moment be handed over to her father. It is not the right view to take that the infant should be given into the custody either of her father or of Mr. and Mrs. Jones. The question is whether she is to be mothered by Mrs. Jones, with whom she has lived from her infancy, or by a woman who is a complete stranger to her. The question is whether she should remain with Mrs. Jones for the next two or three years until she goes to boarding school. It is not suggested that the infant should not spend a part or even a large part of her holidays with her father, and it is admitted that the father should have some voice in her education. We are not opening the case as one in which the father has abandoned his child and has bound himself by a definite agreement not to claim possession of her. The case is one in which the infant might well have the benefit of two homes. We make no charge against the father. De facto the infant looks upon Mr. and Mrs. Jones as her father and mother. We do not say that it is a case in which the father should not have some right of access to the child. In his judgment Eve J. appears to think that the question of the custody of the infant must now be finally determined. That we submit is not the correct view. Further, the learned judge is making a mere guess when he says that he thinks the child will be as happy in one home as in the other. He had no ground for coming to that conclusion. The effect of any order which the Court may make will be to deliver the child to one lady or the other. If the child is delivered to the father, he, being a professional man, would probably see little of the child except upon Saturdays and Sundays, and consequently the care of the child will devolve upon his wife. His wife being a Roman Catholic would be unable to accompany the child to a Protestant Church or to help her in her religious exercises. In those circumstances it is submitted that it would be better in the interests of the infant that she should remain for the present under the care of Mrs. Jones, who has looked after her all her life.

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[WARRINGTON L.J. It might be a much greater shock to the infant to change her surroundings three or four years hence than now.]

We admit that it is reasonable that the infant should get to know her stepmother. What we suggest is that the infant should be allowed to remain with Mr. and Mrs. Jones until and while she goes to boarding school, and that when she leaves school she should then decide which home she will adopt.

[SARGANT L.J. Can we upset the decision of a judge of first instance on a question which is obviously one for the exercise of his discretion ?]

We submit that the discretion of Eve J. has not been properly exercised. The Court must have regard to what is the first and paramount interest of the infant. That was formerly the law, and is still the law under the Guardianship of Infants Act, 1925. No doubt the rights of the father cannot be ignored.

Gover K.C. and *L. W. Byrne* for the respondent Thain were not called upon to argue.

LORD HANWORTH M.R. This is an appeal from an order made by Eve J., directing that the custody of an infant should be committed to her father, the defendant. The question is whether that order made by Eve J. in the exercise of his discretion was right. Was the discretion vested in him rightly and judicially exercised ? These orders which are made with reference to the custody of infants are largely matters of discretion, and this Court should be very careful before it interferes with the discretion so exercised by judges in these matters, especially where the judge is one of such great experience as Eve J.

It is right that I should give a few dates in order to show how the present matter comes before us. The defendant William Arthur Thain married a sister of Mrs. Jones, and on April 29, 1919, a child, who is the infant in the present case, was born. Mrs. Thain then suffered considerably, and she and the child were brought when the latter was

a month old to the home of Mr. and Mrs. Jones, where the defendant, the husband, also went, and where they all remained for several months. On December 3 of that year the mother died, having by her will left property to the value of 11,800*l.* to her husband for life so long as he remained a widower, and then to her child on her attaining twenty-one.

In January, 1920, the husband, having obtained an important appointment under the Air Ministry, left the house of Mr. and Mrs. Jones, but he accepted their offer that the child should remain with them. The child has therefore never known another home, and has been brought up with the children of Mr. and Mrs. Jones as one of the family. From correspondence that took place it appears that Mr. and Mrs. Jones, in order to help the husband, who was then a widower, undertook the custody of the child, and they have faithfully carried out that duty. The father from time to time has paid visits to Mr. and Mrs. Jones to see his daughter, and has contributed to her maintenance at the rate of 12*s.* 6*d.* a week, and has paid other incidental expenses, amounting in the four years ending in December, 1924, altogether to 366*l.* It is clear that originally and for some time afterwards Mr. Thain, the father, was contemplating that this arrangement should continue, as being then a widower it was difficult for him to look after so young a child. On July 25, 1922, Mr. Thain married again, but there are no children of that marriage. His second wife is a member of a different branch of the church from that to which her husband and Mr. and Mrs. Jones belong, but there is no evidence that that would constitute a barrier. In February, 1925, the father demanded that the child should be handed over to him. Mr. and Mrs. Jones having grown fond of the child declined to accede to that demand, with the result that proceedings against them were taken. A writ was issued for leave to issue a writ of habeas corpus, and Talbot J. made an order for the delivery up of the child to her father, but on July 25, 1925, a Divisional Court reversed that order. The judgment of the Divisional Court stood

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for the time being only, and the Lord Chief Justice made it plain in his judgment that his decision was merely with reference to the application then before him. He said: "I desire to say nothing at all which might even be thought in one direction or in any other direction to prejudice or to speculate about the future. This Court has a present and indeed an immediate task to perform. The question is whether the order made is to stand or not to stand. Limiting myself strictly to that task and deliberately avoiding any words which might encourage or discourage any future action, I am bound to say that I have come to the conclusion that this order should be set aside." Shearman J. agreed. Eve J.'s decision does not conflict with that order of the Divisional Court, nor by affirming him do we differ from that order at the time it was made. An appeal to the Court of Appeal was lodged against that order, but it was ordered to stand over until after the hearing of the summons for the custody of the child by Eve J.

We have been referred to various cases and Acts of Parliament, but I am at one with Warrington L.J. in disagreeing with Avory J., that there was evidence here which made s. 3 of the Custody of Children Act, 1891, applicable. That section enacts that: "Where a parent has—(*a*) abandoned or deserted his child; or (*b*) allowed his child to be brought up by another person at that person's expense . . . . for such a length of time and under such circumstances as to satisfy the Court that the parent was unmindful of his parental duties; the Court shall not make an order for the delivery of the child to the parent, unless the parent has satisfied the Court that, having regard to the welfare of the child, he is a fit person to have the custody of the child." That section does not touch the facts of this case. The father intended to leave the arrangement made with Mr. and Mrs. Jones without a limit as to time, but his conduct did not amount to allowing the child to be brought up at those persons' expense for such a length of time and under such circumstances as to satisfy the Court that he was unmindful of his parental duties.

The other statute referred to is the Guardianship of Infants Act, 1925, which by s. 1 provides that the Court, in deciding any such question as we have here, "shall regard the welfare of the infant as the first and paramount consideration." That is no new law, and the welfare referred to there must be taken in its large signification as meaning that the welfare of the child as a whole must be considered. It is not merely a question whether the child would be happier in one place than in another, but of her general well-being. The section merely enacts the rule which had up to that time been acted upon in the Chancery Division. Mrs. Jones may be distressed to part with her niece, and no doubt has a warm affection for her, and there is abundant evidence to show that both Mr. and Mrs. Jones have done all in their power to make this child happy; but Mr. Thain is the father of the child, and is now in a position to offer his child a home where she can have a woman's care, and he now asks that the child should be delivered into his custody.

I appreciate the skill and moderation with which Mr. Maugham and Mr. Robertson have presented their case, and the care they have shown for the feelings of the husband and parties in this appeal. It is said that the child is now with her maternal aunt, and that the father's present wife has not been in touch with the child. At some time the father and his daughter ought to be brought into touch with one another, so that the happy relationship of father and daughter may be established. Mr. Maugham has clearly stated that he does not disregard the right of the father to the custody of the child at some time. At what time? Is the child to be left with Mr. and Mrs. Jones until she has become more and more accustomed to her aunt and uncle? Both sides are of the highest moral character; but I think that the child ought to be brought into contact with her father and in her interests that that time should be the present time, and that she should be given an opportunity of coming to her rightful home. I agree with the judgment of Eve J., and see no reason to disturb it. The true interests of the child are that she should be guided to feelings of love and affection towards her father,

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and of gratitude to Mr. and Mrs. Jones, and I hope the parties will put no impediment in the way of this being done, so that the child may have in effect two happy homes. That will be her true advantage.

WARRINGTON L.J. This is an appeal from an order of Eve J. committing to the father the custody of a girl of seven years of age. The aunt and uncle by marriage of the child, who are the real appellants in this case, say that the order is wrong, and that the Court should hold its hand for the present and make no order removing the child from their custody, which began within a week or two of her birth and has continued until now, leaving it to a future time to review again the state of things. I concur with what the Master of the Rolls has said as to the moderation with which their case has been presented to this Court, but on the other hand that very moderation is fatal to them. It is said that the father has precluded himself from insisting on any right, as he should have undertaken the duties of looking after his child before now. But I think Eve J. was right in concluding that the father was not precluded from changing his mind and under his present altered circumstances from insisting on his position as a father.

This question was pre-eminently one for the exercise by the judge of the discretion vested in him with which this Court will not interfere, unless it is satisfied that it has been wrongly exercised or that some principle of law has been violated by the judge or that there is some other defect. But here the judge has correctly stated the principles on which such orders ought to be made. The welfare of the child is no doubt the first and paramount consideration, but it is only one amongst several other considerations, the most important of which, it seems to me, is that the child should have an opportunity of winning the affection of its parent, and be brought for that purpose into intimate relation with the parent. The judge bore these matters in mind, and was therefore right in coming to the conclusion that the father was entitled to, and that it was for the welfare of the child

that he should take over the duties and enjoy the actual privileges of a father. Eve J. said: "It was said that the little girl would be greatly distressed at parting from Mr. and Mrs. Jones. I can quite understand it may be so, but, at her age, one knows from experience how mercifully transient are the effects of partings and other sorrows, and how soon the novelty of fresh surroundings and new associations effaces the recollection of former days and kind friends, and I cannot attach much weight to this aspect of the case." The learned judge spoke from experience, and what he said appeals to the common sense of human nature. The parting now would not affect the child as it would in later life if we decided to postpone giving the custody to the father. The learned judge has rightly exercised his discretion, and Mr. and Mrs. Jones have shown no ground for our interference with the order he made. I think the learned judge was right, and that I should have acted as he did and made the same order.

SARGANT L.J. It is not necessary for me to say much more than that s. 1 of the Guardianship of Infants Act, 1925, does not affect what was and is the law, that the first and paramount consideration is the welfare of the child. And it is very much for the child's welfare that she should be in the custody and living in the house of her father rather than with the aunt and uncle, however affectionate and kind they may be, especially in a case such as this, where the father has done nothing worthy of blame. There would be a peculiarity in a child always living with its aunt and uncle rather than with its father. Undoubtedly the parting with the child will be a great wrench to the aunt and uncle, but the wrench will be slighter than if the parting were to take place two or three years hence. There is no reason for saying that the learned judge has exercised his discretion on any wrong principle. And I agree with Warrington L.J. that I should have come to the same conclusion myself if the case had been before me in the first instance. There is nothing which will warrant this Court in interfering with

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the order made by Eve J. But both the father and the child owe a great debt of gratitude to the aunt and uncle.

Appeal dismissed.

Solicitors for plaintiff: *Sharpe, Pritchard & Co.*

Solicitors for second defendant: *Tiddeman & Marshall.*

W. I. C.

RUSSELL J. 1926 *March* 17, 18, 19, 23, 24; *May* 21.

In re ANNESLEY.

DAVIDSON *v.* ANNESLEY.

[1925. A. 513.]

Conflict of Laws—English Domicil of Origin—French Domicil of Choice—Nationality—Municipal Law—French Doctrine—Renvoi.

The question whether a person is or is not domiciled in a foreign country is to be determined in accordance with the requirements of English law as to domicil, irrespective of the question whether the person in question has or has not acquired a domicil in the foreign country in the eyes of the law of that country.

In re Johnson [1903] 1 Ch. 821 not followed.

Held, that an Englishwoman, who had never taken the steps presented by art. 13 of the French Civil Code, had nevertheless on the evidence acquired a French domicil of choice, and that the Court would apply the law of France in administering her estate.

Held, on the evidence as to the French law, that the French courts in administering the movable property of the deceased would apply French municipal law, and that accordingly the testamentary disposing power of the deceased was governed by that law.

ADJOURNED SUMMONS.

The facts are taken from the judgment:—

On January 16, 1924, Mrs. Sybil Annesley died at the Château de Quillebaudy at Orthez in France, in which country she had lived ever since the year 1866. (1)

She was married in the year 1860 to an army officer, Mr. James O'Donel Annesley, whose domicil was English. Until 1866 they lived together at Bath, but in that year

(1) It appears to have been undisputed that her domicil of origin was English.

they went to reside at Pau, which continued to be their habitual place of residence until the husband died in July, 1884. From that date it was open to Mrs. Annesley to adopt a domicil of choice. After her husband's death she continued to reside at Pau, where her mother also lived; but they occupied separate establishments. There is no indication that at this time she either owned or took a lease of any residence at Pau; but it was her normal and habitual place of residence.

In 1897 she bought the Château de Quillebaudy, some forty kilometres distant from Pau, where she had a small farm; and there she resided continuously until her death there in 1924. She was then over eighty years of age. Her visits to England were few, the only ones which are clearly established in the evidence, apart from a visit when one of her daughters was married in 1892, are some four in number for short periods, in 1903, 1907, 1911 and 1913. That she did not return after that date may well have been due to the war and to advancing years.

There is no doubt that the château was her home. In her correspondence she alludes to it as such. It was her only home. She never since 1866 had any place of residence in England. According to the evidence of her daughter, Mrs. Davidson, her mother frequently expressed to her dislike of England and the English people, and stated that she never wished to live anywhere but in France, and that she desired to reside in France until she died. At her death a paper was found in which she declared that she wished to be buried in France or in Germany, the latter being the country in which her husband (who in fact died there) was buried.

Mrs. Annesley never took the steps prescribed by art. 13 of the French Civil Code (1) with a view to obtaining a formal French domicil according to French law, but a printed form

(1) L'étranger qui aura été autorisé par décret à fixer son domicile en France y jouira de tous les droits civils [and it is held that the French law of succession becomes applicable to his estate. By the next paragraph, the licence must be renewed every five years if the party does not become naturalized.] —F. P.

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of application for this purpose was found among her papers. It was not filled up. So far as concerns fixing a date for its coming into her possession, all we know is that it was accompanied by a letter from a M. Maisonnier written some time during the war. Neither document is forthcoming.

She owned immovable property in France only.

She owned movable property both in England and in France. Most of her money was trust money, which was credited to her in England, where she had two banking accounts. On these she used to draw cheques and pay them into her banking account at Pau.

On November 20, 1919, she executed a holograph will in the French language. By it, after stating that her two daughters had their share exceeding two-thirds of her property assured by her marriage settlement, Mrs. Davidson's marriage settlement, and her English will, she disposed of the property which she possessed in France. She disposed of Quillebaudy and a pecuniary legacy in favour of a friend. Other immovable property she gave to two servants. She gave specific legacies of French investments to three other servants. The residue of her movable property she gave to the Rev. René Troyte, coupled with a request to pay the duties on the previous gifts and to make donations to certain local charities. It does not appear what were the contents of the English will referred to. It may be a reference to the will next mentioned, for it would appear from the correspondence that she had (at some date earlier than November 25, 1919) instructed Mr. Mellersh, her lawyer in England, to draw her will.

On December 13, 1919, she executed in France a will in English form. It revokes all former testamentary dispositions and purports to dispose of all her real and personal estate. The five servants named in the French will all take benefits under the English will. Pecuniary legacies are given to certain friends. By cl. 4 the real estate and residuary personal estate are given on trust for sale ; out of the proceeds a sum is to be set aside and invested to produce a small annuity, a further sum of 4300*l.* is to be set aside and invested

as a trust legacy. By cl. 5 the ultimate residue is given to her daughter, Miss Annesley, absolutely. Clause 8 runs as follows: "I declare that although I have lived in France for many years and own the house and grounds which I now occupy it has not been and is not my intention to abandon my domicil of origin namely England and I have not made any application under article 13 of the French Civil Code or otherwise for a decree to fix my domicil in France nor have I done anything to become a naturalised subject of France and I intend to remain a British subject."

On July 4, 1921, Mrs. Annesley executed in France a codicil in English form, by which she stated, in cl. 4: "I confirm my said will in all respects as altered by this codicil, and in particular I confirm cl. 8 of my said will as though such clause were set out in this codicil." The summons asked whether the domicil of the testatrix at the time of her death was French or English: (*a*) for purposes of English law; (*b*) for purposes of French law.

It was admitted that if the domicil was French for purposes of French law the testatrix could only dispose of one-third of her personal property, because she left two children surviving her. The testatrix by her will purported to dispose of the whole of her personal property.

Bennett K.C. and *J. M. Lightwood* for the plaintiff, the administratrix with the will annexed. The principles of private international law recognized in this country are part of the law of England. Domicil must be determined by the English Court according to those legal principles applicable to domicil which are recognized here and are part of its law: *In re Martin.* (1) Succession to the movables of the testatrix is governed by the law of her domicil at the date of her death: *Enohin* v. *Wylie* (2); *Doglioni* v. *Crispin.* (3) A de facto domicil is sufficient, and it is not necessary for the testatrix to have fulfilled the conditions which French law requires in order to obtain full civil rights: *Collier* v. *Rivaz* (4);

(1) [1900] P. 211, 227.
(2) (1862) 10 H. L. C. 1, 13.
(3) (1866) L. R. 1 H. L. 301, 314.
(4) (1841) 2 Curt. 855.

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Bremer v. *Freeman* (1) ; *Laneuville* v. *Anderson* (2) ; *Hamilton* v. *Dallas.* (3)

The decision of Farwell J. in *In re Johnson* (4) that domicil requires animus and factum, that is residence ; and that you cannot have legal residence in a country which does not treat residence as a ground for applying its law, must be taken to be overruled by *Casdagli* v. *Casdagli* (5), where the House of Lords held that a man who had gone to reside in Egypt with the intention of making a new and permanent home there, got rid of his English domicil of origin, and acquired an Egyptian domicil, although, owing to his being a British subject, he had not attracted to himself the municipal law of Egypt. In that case Lord Atkinson said that there was no test which must be satisfied for the acquisition of a domicil of choice in Egypt, other than, or in addition to, those which must be satisfied to acquire a similar domicil in a European country—namely, voluntary residence there, together with a deliberate intention to make that residence a permanent home for an unlimited period. In *In re Bowes* (6) the question whether English or French law applied was not argued, and the correctness of the decision in *In re Johnson* (4) was not considered.

The Court will infer that the domicil of the testatrix was French if she has voluntarily fixed her sole or chief residence in France with the intention of continuing to reside there for an unlimited period: *Udny* v. *Udny* (7); *Bell* v. *Kennedy.* (8) The testatrix had her fixed residence in France from 1884 to 1924, and but for the declaration in her will, and the codicil to it, that she had not intended to abandon her English domicil, it could not be denied that her domicil was French. But if the acts of the testatrix show an intention to live and die in France her domicil is not affected by the declaration: *In re Steer.* (9) Where a foreigner has not

(1) (1857) 10 Moo. P. C. 306.
(2) (1860) 2 Sw. & Tr. 24.
(3) (1875) 1 Ch. D. 257.
(4) [1903] 1 Ch. 821.
(5) [1919] A. C. 145, 172, 194.
(6) (1906) 22 Times L. R. 711.
(7) (1869) L. R. 1 H. L. Sc. 441, 458.
(8) (1868) L. R. 1 H. L. Sc. 307, 319.
(9) (1858) 3 H. & N. 594, 599.

fulfilled the formalities required by art. 13 of the Civil Code succession to personalty, under French law, is governed by the national law of the deceased. But if, as in this case, the national law refers the succession to the law of the domicil of the deceased at the time of the death (1), and the domicil is French, then French municipal law will apply: see the decisions of the Cour de Cassation in the *Forgo* case (2) and in the *Soulié* case (3); Westlake's Private International Law, 7th ed., p. 34. It is admitted that if French municipal law applies the testatrix, as she left two children surviving her, could only dispose by her will of one-third of her English personal property and her French movable property.

G. B. Hurst K.C. and *Parton* for the residuary legatee. The domicil of the testatrix at the time of her death was French. In *Anderson* v. *Laneuville* (4) the testator had not obtained an act of Government entitling him to fix his domicil in France, had made his will in English form and declared his intention to return to England, but the Court would not allow the declaration to weigh against a continued residence in France, and held testator's domicil to be French. So too the declaration of a Frenchman of his intention to return to France when he had made his fortune was not allowed

(1) In the case of a nationality covering several jurisdictions in which different municipal laws are administered, this rule is not easy to apply: see the observations of Farwell J. (the value of which is the same whether the decision itself be supportable or not) in *In re Johnson* [1903] 1 Ch. 832–835. Where the propositus was a British subject, we still have to find in what part of the Empire he was domiciled: a question of fact about which there can apparently be no presumption. —F. P.

(2) Clunet, Journal du droit international privé (1883), 64.

(3) Clunet (1910), 888 [where see M. Perroud's learned note regretting the extreme brevity of the reasons, and giving his own conclusion to the same effect in these words: "Si l'on admettait que les deux législations de conflit se référassent aux dispositions de droit international du pays étranger, on aboutissait à un cercle vicieux, les deux systèmes internationaux, français et américain"—the *de cujus* was a citizen of Louisiana settled in France— se renvoyant indéfiniment la détermination de la loi interne applicable. Il fallait donc bien admettre, comme l'a fait en 1905 la Cour de Paris, que les systèmes de conflit visent exclusivement, lorsqu' ils concluent à l'application de la loi étrangère, la loi interné étrangère"].

(4) (1854) 9 Moo. P. C. 325, 335.

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to weigh against his acts, which showed an intention to acquire an English domicil: *Doucet* v. *Geoghegan.* (1) Here the acts of the testatrix show her intention to establish her permanent home in France.

If you assume that no *renvoi* theory is applicable the same result would be reached by applying the law of the domicil, that is to say, the municipal law of the country as applied to its own subjects, so that the French view of international law would not arise. This is the view taken by John Bate in his Doctrine of Renvoi, p. 115. He does not accept the *renvoi* theory, but he arrives at the same result by saying an English Court by the law of domicil means the municipal law of the domicil. Domicil of choice is an inference drawn by the law from the fact of a man voluntarily fixing his chief residence in a particular place with an intention of continuing to reside there for an unlimited time. According to English law the inference is that the man has thereby attracted to himself the municipal law of the territory in which he has voluntarily settled, so that it becomes the measure of his personal capacity: per Lord Watson in *Abd-Ul-Messih* v. *Farra.* (2) Lord Watson therefore does not import into municipal law the theory of international law which sets *renvoi* in motion. If a person is de facto domiciled in France the law of the domicil is applied, because he attracts to himself the municipal law, but not the theory of the conflict of laws. It is submitted that by the law of domicil English Courts mean the internal municipal law of the country which is applicable to a national of that country. That was the solution adopted by the Surrogates' Court of New York in *Re Tallmadge.* (3)

Preston K.C. and *Kenneth Wood* for the pecuniary legatees under the will. The testatrix never lost her domicil of origin, and therefore her movables are distributable according to English law. She could only acquire a French domicil by complying with the formalities of French law contained in

(1) (1878) 9 Ch. D. 441, 455.
(2) (1888) 13 App. Cas. 431, 439.
(3) New York Law Journal, Oct. 17, 1919; 36 Law Quarterly Review, 91.

art. 13 of the Code Napoléon, and that she never did. Residence alone will not get rid of the domicil of origin, and the onus of proving that a domicil has been chosen in substitution for the domicil of origin lies upon those who assert it. Unless a fixed and settled purpose to acquire a new domicil be proved the domicil of origin continues: *Winans* v. *Attorney-General.* (1) There is no doubt here about the residence in France, but the animus manendi is rebutted by the declarations in the will and codicil of the testatrix, and by her not complying with the formalities of French law as to domicil. To establish a domicil of choice this Court must be satisfied that it has been adopted animo et facto. It is essential there should be animus and factum. But French law, unless a decree has been obtained by the propositus under art. 13 of the Code, declines to recognize that the domicil is French. No change is effectual unless the factum is proved, and the factum cannot exist in a country which refuses to recognize it: *In re Johnson* (2); *In re Bowes.* (3) Domicil in its legal meaning is something more than the fact of physical residence coupled with animus manendi. It connotes also a legal relation to the laws of the country of residence by which questions relating to the personal status of the individual are determined: *Casdagli* v. *Casdagli.* (4) Assuming that according to English law the testatrix had only acquired a de facto French domicil then French law would distribute her property according to the law of her nationality. The decisions of the Cour de Cassation are not binding on the lower Courts, and although it was decided in the *Forgo* case (5) and in the *Soulié* case (6) that *renvoi* has a place in French law, yet there are other decisions to the contrary effect: see 120 L. T. J. 237; Westlake's Private International Law, 7th ed., p. 34. The effect of the decision in *In re Johnson* (7) is to deal a death blow to the theory of *renvoi* in respect to succession to movables so far as England is concerned.

(1) [1904] A. C. 287, 290, 291.
(2) [1903] 1 Ch. 821, 828.
(3) 22 Times L. R. 711.
(4) [1918] P. 89, 101.
(5) Clunet (1883), 64.
(6) Clunet (1910), 888.
(7) [1903] 1 Ch. 821.

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Roope Reeve K.C. and *C. L. Fawell* for persons entitled to a trust legacy. The testatrix retained her domicil of origin. She could not obtain a de facto domicil in France, because French law does not recognize a de facto domicil as entailing any legal consequences: *In re Johnson* (1); *In re Bowes* (2); *Hamilton* v. *Dallas.* (3) In this case a French Court would apply the national law of the deceased. French Courts examine the evidence before them to ascertain what the foreign law is, and in each case there is a decision on the question of fact before the Court. These decisions do not establish that the theory of *renvoi* is part of the law of France, but that the Cour de Cassation takes the view that under some foreign law the case would be decided by French law.

Therefore here the question is what in a French Court would be the French view of the English law, and as to that an English Court would assume that the French Court would decide rightly what was the English law. I submit that because of the decision in *In re Johnson* (1) the expert witness would say that English internal law is applicable. *In re Bowes* (2) is a direct authority to that effect. Those cases show that English law ignores the theory of *renvoi*, and in such a case as this applies English law. The origin of the rule that the law of the domicil governs the succession to movables is based on convenience and international courtesy. The rule is satisfied as soon as it is found that the law of the domicil rejects the propositus, and then both on grounds of convenience and courtesy an English Court will apply English law.

Swords for plaintiff's children, entitled to a trust legacy.

Cur. adv. vult.

May 21. RUSSELL J. stated the facts and continued: The first question to be decided is whether the domicil of the testatrix was English or French. But for the fact that Mrs. Annesley took no steps to obtain a formal French domicil

(1) [1903] 1 Ch. 821. (2) 22 Times L. R. 711.
(3) 1 Ch. D. 257, 260.

according to French law, and both in her will and in a codicil to it declared that it was not her intention to abandon her domicil of origin—namely, England, there could not I conceive be any room for doubt as to the position according to English law. She died having acquired a French domicil of choice. To use the language of Lord Westbury in *Udny* v. *Udny* (1) Mrs. Annesley fixed voluntarily her sole residence in France, with an intention of continuing to reside there for an unlimited time. The domicil flows from the combination of fact and intention, the fact of residence and the intention of remaining for an unlimited time. The intention required is not an intention specifically directed to a change of domicil, but an intention of residing in a country for an unlimited time. The above recited facts in my opinion clearly establish both the necessary fact and the necessary intention.

Those who seek to establish an English domicil naturally place much reliance on the declarations in her will and codicil. They contend that we have here two statements made at different times by the lady herself, that she had never intended and did not intend to abandon her English domicil, and that in the face of these statements it is impossible for the Court to hold that a French domicil of choice had in fact or in law arisen. The contention is a tempting one to accede to in view of the fact that the finding of an English domicil would solve sundry other knotty points of difficulty which lurk in the background. But I feel unable to accede to it.

It must I think be conceded that domicil cannot depend upon mere declaration, though the fact of the declaration having been made must be one of the elements to be weighed in arriving at a conclusion on the question of domicil. But if a particular domicil clearly emerges from a consideration of the other relevant facts, a declaration of intention to retain some other domicil will not suffice to destroy the result of those facts. If (as I think she had) Mrs. Annesley had by the factum of long residence and by her animus manendi

(1) L. R. 1 H. L. Sc. 441, 458.

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acquired before the date of her codicil a French domicil of choice, her statement that she never intended to abandon her English domicil will not prevent the acquisition of a French domicil of choice, unless weighing the statement with the other relevant facts the Court comes to the conclusion that the animus manendi had not been established.

In this view it is important to consider the circumstances in which the declaration was made. I gather from the documents that when Mr. Mellersh wrote his letter of November 25, 1919, enclosing a draft will, the draft will did not, in all probability, contain any such declaration. In the will as executed it follows the revocation clause, a clause which usually appears at the commencement or at the very end of a will. In his letter occurs the following passage: "I have drawn the will on the assumption that though you have resided in France for many years and own your house there, you have not lost your English domicil. In other words have you obtained a decree in France permitting you to establish your domicil in France? This is not generally done except as a preliminary step towards naturalisation." That passage would appear to tell Mrs. Annesley that she would not have lost her English domicil if she had not obtained a decree in France. The question he asks her is confined to the point whether she had obtained such a decree. He does not ask the material question—do you intend continuing to live in France or do you intend to return to England and establish your home there?

The answer of Mrs. Annesley appears to me addressed solely to the question put to her: "I have made no declaration of any kind as to a French domicil. I retain my English domicil." In other words she is stating that the step, which Mr. Mellersh had said was necessary to cause the loss of the English domicil, had not been taken by her, and that accordingly she retained her English domicil. What her answer would have been to the material question, had it been put to her, the other facts of the case leave no room for doubt. There was not the remotest intention in her mind of removing her home from France, where she had lived

continuously for over fifty years, to England, a country which she disliked and whose people she disliked.

The repetition of her declaration in the codicil of 1921 carries the matter no further. The extra years of her age only render an intention to uproot and transplant herself all the more unlikely.

It may be, as was suggested, that the insertion of the declarations was due to a desire to avoid litigation such as occurred on the occasion of her mother's death. If so she has been sadly disappointed. In any event the question of her domicil must be determined not by her statement alone, but by a consideration of all the relevant facts. Upon such consideration I have come to the conclusion and decide that according to English law she died domiciled in France.

It was however contended that assuming that all the relevant facts do establish a French domicil, yet in the particular case it was according to English law impossible for Mrs. Annesley to have acquired a French domicil—because not having taken the steps prescribed by art. 13 of the Civil Code she was not and could not be a domiciled Frenchwoman in the eyes of the law of France. In other words the proposition is that no one can, according to English law, acquire a domicil of choice in a foreign country unless that person has also acquired a domicil there according to the law of the foreign country. The contention is founded upon one branch of the judgment of Farwell J. in the well known case *In re Johnson*. (1)

Such a contention appears to me inconsistent with many decisions in the Courts of this country. In *In re Martin* (2) Lindley M.R. clearly lays it down that domicil is to be determined by English law. His judgment is no doubt a dissenting judgment, but the effect of his views upon this particular point is not weakened or affected by that fact. "The domicil . . . . must be determined by the English Court . . . . according to those legal principles applicable to domicil which are recognised in this country and are part of its law." If it were otherwise the question whether an

(1) [1903] 1 Ch. 821. (2) [1900] P. 211, 227.

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individual were domiciled in France (or in any other country which requires the fulfilment of certain legal requirements before a person can be considered by the Court of that country as domiciled in that country) would be solved quite easily in every case by ascertaining whether those legal requirements had or had not been fulfilled. Yet there have been numerous cases (some of which appear in the books) in which the question has always been considered and answered by an elaborate consideration of the various facts and circumstances in each case.

In *Hamilton* v. *Dallas* (1) Lord Howden was held to have died domiciled in France—but he had acquired no legal domicil there according to French law. In *Bremer* v. *Freeman* (2) an Englishwoman was held domiciled in France —she had not complied with the provisions of art. 13 of the Code. In *Collier* v. *Rivaz* (3) an Irishman was held domiciled in Belgium (where the Code Napoléon applies), notwithstanding that he had not complied with art. 13: see too *Anderson* v. *Laneuville.* (4)

The view that no domicil in a foreign country can be acquired in the eyes of the English law unless such domicil has also been acquired in the eyes of the law of the foreign country appears to be based on two cases only—namely, the decision of Farwell J. in *In re Johnson* (5) and a case, reported only in the Times Law Reports, of *In re Bowes.* (6)

In re Johnson (5) was the further consideration of an action in which various inquiries had been ordered upon which the Master had made his certificate, which was binding upon the parties. The question to be determined in the action was who was entitled to the undisposed of personal estate of a testatrix whose will contained no residuary bequest. The certificate found that at the date of her will and death she was domiciled in Baden, and that according to the law of Baden the legal succession to that part of her property which was undisposed of by her will was governed by the

(1) 1 Ch. D. 257.
(2) 10 Moo. P. C. 306.
(3) 2 Curt. 855.
(4) (1854) 9 Moo. P. C. 325.
(5) [1903] 1 Ch. 821.
(6) 22 Times L. R. 711.

law of the country of which she was a subject at the time of her death. She was born in Malta, a British subject. She had never been legally naturalized in Baden. There was no suggestion that she had ever ceased to be a British subject. The question submitted to the Court was whether the persons entitled to the undisposed of personal estate were to be found according to Maltese law or English law. Mr. Justice Farwell, to put it shortly, held that since the testatrix was not domiciled in Baden in the eyes of the law of Baden, the Baden domicil was for this purpose no domicil at all, and that therefore the testatrix having failed to acquire an effectual domicil of choice, her Maltese domicil of origin remained. He held, therefore, that the persons entitled must be ascertained according to the law of the domicil of the testatrix—namely, the law of Malta. Having disposed of the case on this ground, he proceeds to arrive at the same result by a different route.

There can, I think, be no doubt that the first ground of the decision involves the view that a domicil in a foreign country not recognized by the law of that country is, in the eye of the English law, no domicil at all.

This aspect of *In re Johnson* (1) has been subjected to criticism at the hands of Scrutton L.J. in a judgment dissenting from the decision of the Court of Appeal in *Casdagli* v. *Casdagli*. (2) The decision of the Court of Appeal was reversed in the House of Lords (3), who approved entirely of the judgment and reasoning of Scrutton L.J.

If *In re Johnson* (1) stands alone as a decision, and if I am free—and I think I am—to follow my own view, I would prefer to follow what I have always considered the true view—namely, that the question whether a person is or is not domiciled in a foreign country is to be determined in accordance with the requirements of English law as to domicil, irrespective of the question whether the person in question has or has not acquired a domicil in the foreign country in the eyes of the law of that country.

(1) [1903] 1 Ch. 821. (2) [1918] P. 89, 109.
(3) [1919] A. C. 145, 194.

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It is said, however, that *In re Johnson* (1) does not stand alone, but that Swinfen Eady J. came to the same conclusion and adopted the same view in *In re Bowes.* (2) I have had the advantage of reading the shorthand notes of the entire proceedings in that case, and I have no hesitation in saying that the case should never have been reported. The point was neither discussed nor argued; nothing was cited of *In re Johnson* (1) except the headnote. The question arose in connection with succession duty. If English law applied certain succession duty was payable. If French law applied it was not payable. The parties before the Court whose interest it was to argue that the duty was not payable stated that in order to obtain a speedy administration of the estate they preferred that succession duty should be paid and the estate administered according to English law; and the judge, without in any way applying his mind to the question whether *In re Johnson* (1) was correctly decided or not, simply followed *In re Johnson* (1), as all parties desired that he should. The case is of no value as a decision, and should, I repeat, never have been reported.

In the result I prefer to adopt the view stated by Lindley M.R. in *In re Martin* (3), and I hold that the question whether Mrs. Annesley died domiciled in France must be answered by ascertaining whether she had abandoned her English domicil and had acquired a French domicil of choice in accordance with the requirements of English law—namely, by the factum of residence coupled with the animus manendi, and that regardless of the question whether she had or had not complied with the formalities required by French law to be carried out by her before she could rank in its eyes as a domiciled Frenchwoman.

I accordingly decide that the domicil of the testatrix at the time of her death was French. French law accordingly applies, but the question remains: what French law? According to French municipal law, the law applicable in the case of a foreigner not legally domiciled in France is

(1) [1903] 1 Ch. 821. (2) 22 Times L. R. 711.
(3) [1900] P. 211, 227.

the law of that person's nationality, in this case British. But the law of that nationality refers the question back to French law, the law of the domicil; and the question arises, will the French law accept this reference back, or *renvoi*, and apply French municipal law?

Upon this question arises acute conflict of expert opinion. Two experts took the view that the *renvoi* would not be accepted, but that a French Court would distribute the movables of the testatrix in accordance with English municipal law. One expert equally strongly took the view that a French Court would accept the *renvoi* and distribute in accordance with French municipal law. I must come to a conclusion as best I can upon this question of fact upon the evidence after considering and weighing the reasons given by each side in support of their respective views. It is a case rather of views expressed by the experts as to what the French law ought to be, than what it is. Although there is in France no system of case law such as we understand it here—the decisions of higher Courts not being binding upon inferior tribunals (1)—yet I think I must pay some attention to the fact that this question of *renvoi* has at different times come for consideration before the Cour de Cassation, the highest Court in France, and each time with the same result—namely, the acceptance of the *renvoi* and the application of the French municipal law. It is true that the Cour de Cassation is quite free to take the opposite view on a future occasion, but it has never done so. I refer to the cases which were discussed and expounded before me—namely, the *Forgo* case (2) in 1882, and the *Soulié* case (3) in 1910. In the former case, a decision of the Cour de Cassation, the *renvoi* was accepted, and French municipal law was applied to the disposition of the estate of a Bavarian national domiciled de facto in France (but not domiciled there according to French law), because according to Bavarian law the law of the domicil or usual residence was applicable. The *Forgo*

(1) [Nevertheless controverted points may be finally settled by a uniform current of doctrine, "jurisprudence constante."—F. P.]

(2) Clunet (1883), 64.

(3) Clunet (1910), 888.

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case gave rise to grave differences of opinion among French jurists and was followed by many conflicting decisions in lower Courts, some favouring the "Théorie du Renvoi" (1), others against it. The matter again came under the consideration of the branch of the Cour de Cassation entitled Chambre de Requêtes, one of whose functions is to decide whether or not an appeal to the Cour de Cassation should be allowed to proceed. That was the *Soulié* case, in which the Court below had held that French municipal law governed the succession to the movable property of an American subject who had died in France with a de facto domicil in that country. The Chamber declined to allow an appeal to the Cour de Cassation to proceed. This decision, coming as it did after the grave differences of opinion which resulted from the *Forgo* case, strikes me as of great importance. As is pointed out in a note to the report in Clunet (2) it shows that the Supreme Court persists with energy in its former view, notwithstanding the views of text writers to the contrary.

In these circumstances, and after careful consideration of the evidence of the experts called before me, I have come to the conclusion that I ought to accept the view that according to French law the French Courts, in administering the movable property of a deceased foreigner who, according to the law of his country, is domiciled in France, and whose property must, according to that law, be applied in accordance with the law of the country in which he was domiciled, will apply French municipal law, and that even though the deceased had not complied with art. 13 of the Code.

The result is that as regards her English personal estate and her French movable property the testatrix in this case had power only to dispose of one-third thereof by her will.

Speaking for myself, I should like to reach the same conclusion by a much more direct route along which no question of *renvoi* need be encountered at all. When the

(1) [English writers (e.g., Dicey, Appendix, Note 1) appear to use the term "doctrine of the *renvoi*" in a sense exactly contrary to this, meaning the view which the Court of Cassation rejected.—F. P.]

(2) Clunet (1910), 888, 892.

law of England requires that the personal estate of a British subject who dies domiciled, according to the requirements of English law, in a foreign country shall be administered in accordance with the law of that country, why should this not mean in accordance with the law which that country would apply, not to the propositus, but to its own nationals legally domiciled there? In other words, when we say that French law applies to the administration of the personal estate of an Englishman who dies domiciled in France, we mean that French municipal law which France applies in the case of Frenchmen. This appears to me a simple and rational solution which avoids altogether that endless oscillation which otherwise would result from the law of the country of nationality invoking the law of the country of domicil, while the law of the country of domicil in turn invokes the law of the country of nationality, and I am glad to find that this simple solution has in fact been adopted by the Surrogates' Court of New York. (1)

Certain other subsidiary questions arise. In consequence of the restrictions on the power of the testatrix to dispose of her property, the legacies bequeathed by the English will cannot be paid in full. The will, in my opinion, is so worded that the pecuniary legacies given by cl. 2 of the will must be paid in full before any of the sums mentioned in cl. 4 of the will are set apart or paid. These last mentioned sums must if necessary abate rateably.

Solicitors: *Reid Sharman & Co.; Ellis & Ellis; Routh, Stacey & Castle, for Colbourne, Bush & Bartlett, Brighton.*

(1) *Re Tallmadge*, New York Law Journal, Oct. 17, 1919, *quaere* whether reported elsewhere: see 36 Law Quarterly Review, 91.

J. B. B. M.

C. A.
1926
April 13.

In re SCHINTZ.

SCHINTZ *v.* WARR.

[1925. S. 4447.]

Practice—Service out of Jurisdiction—Company established in France—Settlement of Shares in Company—Action by one Trustee who was also a Beneficiary against Co-trustees for Breach of Trust in voting for Resolution to capitalize part of Reserve Fund—Validity of Resolution—French Company made Party—Forum conveniens—Service of Notice of Writ on Company out of Jurisdiction—"Necessary or proper party"—Order XI., *r.* 1 (*g*).

By the articles of a company, established in France according to French law, it was provided (inter alia) that "any dispute which may arise during the existence of the company, whether between the company and its shareholders or among the shareholders themselves, respecting the affairs of the company must be submitted to the Commercial Court at Douai." The plaintiff, who was a trustee of, and also entitled to a life interest under, a settlement by which a large number of the shares of the company were settled, brought an action against her co-trustees for breach of trust in voting without her authority in favour of a resolution of the company to capitalize part of its reserve fund and for damages. She also claimed a declaration that the resolution was invalid, and for that purpose joined the company as a co-defendant.

She subsequently obtained an order giving her leave to issue a concurrent writ, and to serve notice thereof upon the company out of the jurisdiction on the ground that the company was a necessary and proper party to the action within Order XI., r. 1 (*g*). The company entered a conditional appearance, and moved to discharge the order on the ground that it was not domiciled or ordinarily resident within the jurisdiction and was not a necessary or proper party to the action.

Lawrence J. dismissed the application. On appeal:—

Held, that, inasmuch as (1.) the primary issue in the action was whether the trustees acted without the authority of the plaintiff and in breach of their duty as trustees and the question of the validity of the resolution was only a subsidiary issue for the purpose of ascertaining the amount of the damages in the event of the plaintiff succeeding on the primary issue, and (2.) a decision of the English Court on the subsidiary issue would not be final having regard to the company's article by which the French tribunal was made by the shareholders and the company the only tribunal for determining disputes between them, the company was neither a necessary nor a proper party to the action within the meaning of Order XI., r. 1 (*g*), and, therefore, the order giving leave to the plaintiff to serve notice of the writ upon the company out of the jurisdiction must be discharged.

Decision of Lawrence J. reversed.

APPEAL from the decision of Lawrence J.

The plaintiff's father purchased certain works at D'Auby in the Département du Nord in France in 1870, and carried on there the business of a manufacturer of nitrate products, which in 1911 he converted into a company called "Manufacture de Produits Chimiques d'Auby." The company was incorporated under French law with a capital of 5 million francs divided into shares of 500 francs each.

The plaintiff's father died in 1912, having made his will dated April 16, 1912, under the trusts of which, and of a settlement dated December 12, 1906, the plaintiff, Dora Cecilia Schintz, was beneficially entitled during her life to one-third of the shares in the company, and the plaintiff's sister, Mrs. Moreton, and her children, were entitled to the remaining shares, and also in reversion to the shares in which the plaintiff had a life interest. There were four trustees of the settlement constituted by the will and settlement, of whom the plaintiff was one, the others being Mr. Warr, Lloyds Bank, Ld., and Mr. Hasler, Senior.

The company had its registered office in France, and its meetings were generally held in Paris. The direction of the company was in the hands of three directors—namely, Mr. Wood, Mr. Hasler, Junior, the son of Mr. Hasler, Senior, and M. Lambert—of whom two, including the Chairman, resided in England and the third resided in Paris. By art. 42 of the company's articles of association it was provided that all questions relating to the social affairs and the rights inter se of the corporators were to be decided by the Tribunal de Commerce de Douai, and that for that purpose all persons were to be supposed to have a domicil within the jurisdiction of that Court, and that, in the event of their not selecting a domicil or an address within the jurisdiction of that Court, the address of the Procurator attached (1) to the Tribunal de Commerce of Douai was to be the address at which all documents could be served upon the members of the company.

(1) [The translation with the papers reads "nearer," seemingly meant to stand for *près*; the original is not accessible.—F. P.]

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In September, 1924, the company, which was possessed of a very considerable reserve fund, determined to increase its capital to 7,500,000 francs, and by capitalizing part of its reserve fund to enable it to distribute bonus shares which were issued as against such reserve fund. Accordingly, on September 25, 1924, a resolution was passed at a meeting of the company to capitalize 2,500,000 francs, part of the reserve fund of the company.

In consequence of that resolution the plaintiff brought this action against her co-trustees, her sister and the other beneficiaries and the company, in which she asked for a declaration that the trustees had been guilty of a breach of trust in purporting to vote in favour of the resolution without her authority and against her wishes, and that the resolution was not validly passed and was void and of no effect, and for damages against the trustees owing to her having been deprived of a substantial part of what, but for the resolution to capitalize, would have come to her as income.

By an order made in the action on November 30, 1925, by Astbury J. (whose attention was not called to art. 42 of the company's articles of association), leave was given to the plaintiff to issue a concurrent writ, and to serve notice thereof upon the company out of the jurisdiction on the ground that the company was a necessary and proper party to the action within Order XI., r. 1 (*g*).

On December 30, 1925, the company entered a conditional appearance without prejudice to an application to set aside the notice of the writ served on it in the action.

On February 26, 1926, the company moved to discharge that order and to set aside the service of the notice on it on the ground that it was not domiciled nor ordinarily resident within the jurisdiction and was not a necessary or a proper party to the action.

Lawrence J. held that as the question whether the defendant trustees had been guilty or not of the breach of trust with which they were charged depended upon the validity of the resolution, the French company was a proper party to the action within the meaning of Order XI., r. 1 (*g*);

that although that question fell to be determined according to French law, the English Court would not shrink from deciding the question of fact as to what was the French law on the subject; and, further, that, having regard to all the circumstances and the position of the parties, and in view of the fact that two of the three directors and the holders of 95 per cent. in value of the shares of the company were resident and domiciled in England and British subjects, there was nothing harsh or unjust in retaining the French company as a defendant to the action. He accordingly dismissed the application.

The French company appealed.

Sir Herbert Cunliffe K.C. and *Arthur Sims* for the appellant company. Lawrence J. was wrong in saying that the first question was whether an effective resolution had been passed. The whole basis of the plaintiff's case is that the trustees have wrongly exercised their voting powers. The view of the appellant company is that it is not concerned in the domestic disputes between the plaintiff and her co-trustees. The question turns entirely on Order XI., r. 1 (*g*). If the primary object of the action is to establish the invalidity of the resolution the proper tribunal is the French tribunal. The claim against the trustees is based on there being an effective resolution. The first issue to be tried is whether the resolution was properly passed and to be tried by the French tribunal.

This is a foreign company, and notwithstanding the fact that the bulk of its shareholders are British subjects the plaintiff is not entitled to any exceptional favour on that account: *Janson* v. *Driefontein Consolidated Mines, Ld.* (1)

There are really two questions involved in the action: (1.) Does the case fall within Order XI., r. 1 (*g*) ? and (2.) if it does, is it one in which service out of the jurisdiction ought to be allowed ? The company is not, it is submitted, a proper party to the action. It has no concern with the question whether or not there has been a breach of trust by the

(1) [1902] A. C. 484, 497.

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trustees. It is not right therefore that the French company should be brought here while the question in which it has no interest is litigated. If the matter between the shareholders and the company has to be litigated the proper tribunal is that provided for by art. 42—namely, the Commercial Court at Douai. A very strong case must be made out before foreigners can be brought over to this country to litigate questions of English law and a fortiori of French law: *Société Générale de Paris* v. *Dreyfus Brothers* (1); *The Hagen* (2); *Johnson* v. *Taylor Brothers & Co.* (3) The substance of the matter must be looked at: *Rosler* v. *Hilbery.* (4) The reasoning of that case applies to the present. Even if the case comes within the second limb of r. 1 (*g*) the French Court is the forum conveniens to decide the question according to French law.

The order ought to be set aside.

Maugham K.C. and *Dighton Pollock* for the respondent. The order of the judge was right, and ought not to be set aside. At the trial the plaintiff will have to satisfy the Court whether the resolution is good or bad in order that the Court may be in a position to determine on what basis she would be entitled to damages.

It is suggested by the company that the plaintiff should bring two actions. That would be a great hardship on the plaintiff.

As to r. 1 (*g*) of Order XI. the test to be applied is that laid down in *Massey* v. *Heynes* (5)—namely, "supposing both parties had been within the jurisdiction would they both have been proper parties to the action?" Rule 1 is, it is submitted, a special rule, having for its sole object the allowing of all questions arising between the parties to be determined in one action. The fact that a defendant is abroad is not a reason for not serving him. The rule postulates that he is abroad. A cognate case to this is *Williams* v. *Cartwright* (6), where in an action for deceit against three defendants jointly,

(1) (1885) 29 Ch. D. 239, 242, 243.
(2) [1908] P. 189.
(3) [1920] A. C. 144, 153.
(4) [1925] Ch. 250.
(5) (1888) 21 Q. B. D. 330, 338.
(6) [1895] 1 Q. B. 142.

two of whom were resident in England and one in Scotland, service of the writ upon the latter out of the jurisdiction was allowed.

The cases cited on the other side were very special in their facts. In *Johnson* v. *Taylor Brothers & Co.* (1) the breach of contract there alleged was a mere device. The claim here against the trustees is not a device, but is the main object of the action. That case does not therefore assist the appellant company. In *Rosler* v. *Hilbery* (2) the injunction sought against the defendant Hilbery was wholly unnecessary, and was merely a device to found jurisdiction against a person who was out of the jurisdiction. The plaintiff here is concerned to see that her action when it comes to be tried will not be held to be not maintainable by reason of the absence of the French company.

As to art. 42 of the company's articles, the tribunal at Douai would only be able to deal with the question of the validity of the resolution and not with the question of the breach of trust. The jurisdiction given to the Douai tribunal in only where the matter concerned is an affaire sociale. The article does not say that the Commercial Court shall have exclusive jurisdiction where the dispute as to an affaire sociale is only incidental to other matters.

The judge was right in saying that there were two questions raised, first, whether the case comes within r. 1 (*g*), and as to that the test is, would the company, if registered in England, be a proper party to the action ? and it is submitted it would. The second question is whether the case is one in which service of the notice of the writ ought to be allowed. As to that it is submitted the question was one for the exercise by Lawrence J. of his discretion, and he rightly exercised it, and his decision ought not to be interfered with.

It is submitted therefore that all the facts of the case are in favour of the English Court being the forum conveniens, and there is nothing in the case which prevents the French company being brought here.

No reply was called for.

(1) [1920] A. C. 144. (2) [1925] Ch. 250.

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LORD HANWORTH M.R. stated the facts and continued: In order to serve the defendant company it was necessary for the plaintiff to obtain the leave of the Court under Order XI., r. 1, which provides that "Service out of the jurisdiction of a writ of summons may be allowed by the Court or a judge whenever . . . . (*g*) Any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction." The other defendants, of course, could be and were duly served within the jurisdiction. It was claimed as against the company that it was a necessary, or, if not a necessary, still a proper party to the action. The words of sub-r. (*g*) of r. 1 are disjunctive, and a person may be served if he is either a necessary or a proper party to the action properly constituted. Thereupon an application was made, and Astbury J. gave leave to serve notice of the writ under the rule which I have just read on November 30, 1925, the writ having been issued on November 14 previously. On December 30 a conditional appearance was entered by the company, and on January 18 of this year the company moved to set aside the order for leave to serve notice of the writ out of the jurisdiction. On February 26 Lawrence J., before whom that application came, dismissed it, and it is from that decision that the present appeal is brought.

It is important to remember that in these cases it is not a matter of right that leave should be given to serve notice of the writ because, as I pointed out in *Rosler* v. *Hilbery* (1), the terms of Order XI. do not provide for leave to be given as of course. It is only as a matter of discretion that service of the notice of the writ of summons may be allowed. It is also important to bear in mind that by this time the three rules which were enunciated by Farwell L.J. in *The Hagen* (2) are binding upon this Court. In that judgment he adopted the statement of Pearson J. in the *Société Générale de Paris* v. *Dreyfus Brothers* (3), that "it becomes a very serious question, and ought always to be considered a very

(1) [1925] Ch. 250, 259. (2) [1908] P. 189, 201.
(3) 29 Ch. D. 239, 242.

serious question, whether or not, even in a case like that, it is necessary for the jurisdiction of the Court to be invoked, and whether this Court ought to put a foreigner, who owes no allegiance here, to the inconvenience and annoyance of being brought to contest his rights in this country, and I for one say, most distinctly, that I think this Court ought to be exceedingly careful before it allows a writ to be served out of the jurisdiction." That is the first rule. The second is that "if on the construction of any of the sub-heads of Order XI. there was any doubt, it ought to be resolved in favour of the foreigner"; and the third rule is that, "inasmuch as the application is made ex parte, full and fair disclosure is necessary, as in all ex parte applications." I do not desire in this case to add to the observations which I made in *Rosler* v. *Hilbery*. (1) Those followed the observations that had been made in their speeches by the learned Law Lords in *Johnson* v. *Taylor Brothers & Co.* (2) But it was pointed out there by Lord Birkenhead, and particularly by Lord Haldane, that the Court is entitled to refuse to give leave in a case in which the proceedings are within the letter, but not in substance within the reason for exercising the jurisdiction, and all the learned Law Lords point out that the matter is one for the discretion of the Court.

That being so, I am very reluctant indeed to interfere with the exercise of the discretion by Astbury J. in the first instance, and with that by Lawrence J. in the second. But for matters to which I am now going to refer I should be inclined not to allow the appeal. It appears to me however that full weight has not been given by those learned judges to matters which we have to bear in mind in this Court. Astbury J. was not informed of the existence of one of the articles of this company which has, to my mind, an important bearing upon the present case. It was brought to the attention of Lawrence J., but he does not appear to have attached importance to it; there is no reference to it in his judgment. The article in question is art. 42, which provides that all the questions relating to the social affairs, the rights inter se

(1) [1925] Ch. 250. (2) [1920] A. C. 144.

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of the corporators, are to be decided by the Tribunal de Commerce of Douai, and, furthermore, that for the purpose of carrying that out, all persons are supposed to have a domicil within the jurisdiction of that Court, and still more, in the event of their not selecting a domicil or an address within the jurisdiction of that Court, the address of the procurator attached to the Tribunal de Commerce of Douai is to be the address at which all documents can be served upon the members of the company. It is quite clear, therefore, that on matters which concern the rights of the company and members of the company inter se the members of the company have agreed that the decision to which they will submit all their difficulties is that of the Tribunal de Commerce of Douai.

Now in the present action the plaintiff, Miss Schintz, claims several items of relief. She asks first for a declaration that her co-trustees were guilty of a breach of trust in purporting, as trustees of the settlement, to vote without the authority of the plaintiff in favour of and thereby procuring the purported passing of the resolution whereby a sum of two and a half million francs, part of the reserve fund of the defendant company, was expressed to be capitalized. Secondly, she claims the removal of the two personal defendants from the trusteeship, and she also claims damages for breach of trust, and, if and so far as necessary, execution of the trusts, and so on. It is clear that that claim is based on the fact of the passing of a resolution at an extraordinary general meeting of the company.

It is said by Mr. Maugham—I think perhaps said in advance of what is necessary for him to say or admit—that item 3 of the claim is an alternative claim. That claim is for a declaration that the resolution purported to have been passed at the meeting was not validly passed, and is void and of no effect. I am not quite sure that that is a complete alternative claim, because inasmuch as claim 1 deals with or charges a breach of trust in procuring the purported passing of the resolution, the claim would not appear to do more than affirm the fact of there being a resolution

without in any way suggesting that it was a valid resolution, and claim 3 definitely asks for a declaration that the resolution was not validly passed. I merely say this, as I wish to leave all claims that the plaintiff may have completely open. But however that may be, it is clear that the plaintiff does not proceed against the defendants, her co-trustees, on the basis of there being a resolution in fact passed by the assistance of those three trustees who acted without her authority and in defiance of their duty as trustees; and it is clear that she claims damages against them for misconduct as trustees. If it be an alternative to that, she also claims a declaration that the resolution was not validly passed, but it appears to me that the first step towards her success in the action is for her to prove that she did not give any authority to her co-trustees to take the action they did, whatever it may have been, for the purpose of passing the resolution which affected her rights in so important a matter. If they acted without her authority and in breach of their duty as trustees she will have established her main proposition against them. It will then be a question what is the subsidiary relief to which she is thereupon entitled in order to meet the dereliction of duty on the part of those defendants against whom she charges the breach of trust. She claims to be entitled to damages. Those damages may be enhanced by the fact that the resolution that has been passed with the assistance of these defendants is in fact valid. So long as it remains unrepealed and unwithdrawn it appears to me ex facie valid, and the trustees will then have to take upon themselves the responsibility and liability of having taken part in the passing of what is an existing resolution for the purpose of capitalizing two and a half million francs, part of the reserve. It does not appear to me that the plaintiff will have to establish that the resolution has been validly passed. It is possible that these defendants may wish to show that it was not validly passed, but it appears to me, differing on that point from the learned judge, that instead of the question of the validity of that resolution being a primary issue in the action it will be a subsidiary

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issue necessary only for the purpose of ascertaining what are the damages which should be paid by these defendants. If these defendants have, in breach of their duty, contributed to the passing of this resolution, a resolution which still stands, it will be for them to show either that the resolution does not stand or that some circumstances exist which may mitigate the damages which prima facie they would be liable for on these facts to the plaintiff.

I differ from the learned judge, therefore, in not regarding the validity or invalidity of the resolution as primary to the rights of plaintiff. More than that, I regard art. 42 as of great importance from this point of view, that the members of the company, the four trustees and those persons who are also holders of shares of the company, have all agreed that the proper tribunal to determine their rights and all liabilities inter se is the Tribunal de Commerce of Douai.

We have therefore to consider whether or not in our discretion, which is to be exercised judicially, it is right that the defendant company should be forced to come and be a party to this action. It has been said in many other cases, and it was certainly said in *Rosler* v. *Hilbery* (1), that where a foreigner will, when he comes before the Court, in the action only hold a subsidiary place great care ought to be exercised before notice of the writ is allowed to be served upon him. More than that, one has to consider what is the forum conveniens. The forum conveniens in the present case where art. 42 obtains certainly appears to exclude the present Courts, for by the social contract of the company the plaintiff appears to have agreed with the other shareholders that these matters should be submitted to the Tribunal de Commerce.

Under those circumstances we have to consider whether it is right that this order for the issue of the notice of writ should stand. I find it difficult to regard the presence of the defendant company as of primary importance to the elucidation of the rights of the plaintiff. It appears to me an inconvenient course to bring the company to this country and to

(1) [1925] Ch. 250.

try the validity of the resolution over here, because it seems to me that the validity of the resolution can and must be tried in the Court at Douai, and whatever the Court over here may decide, its decision would not be binding upon that tribunal. The result is that the Courts over here would not have finally determined the rights of the parties to the social contract with the defendant company if they have to be determined in the Court at Douai. Under all these circumstances is it possible for us to say that the defendant company is a necessary or a proper party? From what I have already said it is, in my opinion, plain that the defendant company is not a necessary party, and I think also not a proper party.

I regret that I am differing from Lawrence J. and Astbury J., but, as I pointed out, we are not really differing from Astbury J., because he had not the materials before him which we have before us; and Lawrence J. did not appear to attach the importance which I think ought to be attached to the articles of the company.

For these reasons the appeal ought to be allowed, and the order giving leave to serve notice of the writ out of the jurisdiction should be discharged with costs to the appellant company both here and below.

WARRINGTON L.J. I am of the same opinion. This is an appeal from an order of Lawrence J. refusing to discharge an order made ex parte by Astbury J., allowing service of notice of the writ upon a foreign corporation out of the jurisdiction. In my opinion there are three objections to the order, each of which is fatal. The first is that the affidavit on which the order was made did not give a sufficient disclosure of the circumstances material to be known to the learned judge. The second is that, in my opinion, the case does not fall within any one of the cases provided for by Order XI., r. 1, the only one within which it could possibly be suggested it falls being sub-r. (*g*). And the third objection, to my mind, is that it would be impossible properly to determine such a question as that which it is proposed to be raised

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against the company in these Courts in England for a reason which I will explain later on.

With regard to the first point, the affidavit on which the order was made first misrepresents what is, in my opinion, the true effect and purport of the writ as appears on its face, and, secondly, it omits to mention the fact that the only tribunal which could determine the question between the shareholders and the company is the French Tribunal, the Tribunal de Commerce of Douai. With regard to the first of those defects in the affidavit, it is of importance to consider first the terms of the writ, notice of which it was desired to serve out of the jurisdiction. The writ is headed: "In the matter of the trusts of the will dated the 16th April, 1912, of Schintz, and in the matter of the trusts of an indenture of settlement dated the 12th December, 1906," and it is brought by a person who is one of the trustees against the three other trustees, and the only other persons who are beneficially interested in the trusts, omitting for the moment the French corporation, which is also made a defendant to the action. Now it being brought against the persons whom I have mentioned, it asks for the ordinary relief on the footing of breach of trust. It asks for a declaration that the plaintiff's three co-trustees were guilty of a breach of trust in purporting, as trustees, to vote without the plaintiff's authority in favour of a certain resolution passed by the members of the foreign corporation. It then asks for the removal of those trustees, one of the reliefs incidental to the establishment of a breach of trust, and omitting the third declaration for the moment, it asks for damages for breach of trust against the trustees, and so far as it may be necessary, execution of the trusts of the settlement. But in the middle of the relief sought against the trustees a claim (No. 3), which I omitted for the moment, is inserted for a declaration: "That the said resolution purporting to have been passed at the extraordinary general meeting of the defendant company was not validly passed and is void and of no effect." Now that declaration, so far as the action is an action against the trustees and the beneficiaries, seems to me to be outside the scope of the action

altogether. It only incidentally may become material whether the effect of their voting was to produce a valid resolution or whether the effect of their voting was to produce an invalid one and only material in this respect, that on the determination of that issue might depend the amount of the damages which could be recovered against the trustees. That, in my opinion, is the true effect of this writ, and if the third declaration is material at all, it is only material as affecting the amount of damages.

Now how is the writ represented in the affidavit filed in support of the ex parte application? I turn to that affidavit, and I find it there stated that the ground on which this writ was issued was not breach of trust by the trustees, but that the object of issuing the writ was to ascertain directly whether or not this was a valid resolution of the company. The affidavit refers to a previous action in which some question had arisen with regard to the conduct of the trustees, and states that the case had been adjourned into chambers for the filing of evidence, so that the Court, might give directions as to how the trustees should vote with regard to the capitalization of certain reserves in the hands of this company. Then it goes on to state that the resolution had actually been passed, the resolution now in question, or purported to have been passed, and it proceeds to say this: "The said Dora Cecilia Schintz is advised that she should issue a writ in this action for a declaration that the resolution was not validly passed and is void and of no effect and for other consequential relief," that is to say, making the validity or invalidity of the resolution the main object of the action. That being so, it seems to me obvious that if that is the true view of it—I do not think it is, but that is the effect of the writ expressed by the deponent—and if Astbury J. had been informed that by the social contract between the foreign corporation and this plaintiff as one of the shareholders in the corporation the only tribunal for determining disputes between them is the Tribunal de Commerce at Douai, it is inconceivable to my mind that he would have allowed this writ to be issued. But whether that be so or not, it was at all events a material

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circumstance to which his attention ought to have been called and the absence of which would be fatal to the ex parte order. On that ground alone I think the ex parte order ought to have been discharged.

Now I come to the second ground. Treating the action as an action not for the main purpose of obtaining a declaration of invalidity of this resolution and setting it aside, but treating it as an action against the trustees for breach of trust, is the company a necessary and proper party to this action? In my opinion the company is neither a necesary nor a proper party. The company has nothing to do with the amount of damages which may be recovered by the plaintiff for the breach of trust of these trustees. The company is not concerned with that, and to suppose that you can bring into such an action anybody whose conduct may incidentally have affected the amount of those damages seems to me to be unarguable. The company is not concerned in any way with any such question. I can quite understand that there may be cases in which a company may be a necessary and proper party as, for instance, where the question relates to the title to its shares and the register of the company is going to be affected. But in a case like the present it seems to me that the company would not be a necessary or a proper party to this action for breach of trust merely because the validity or invalidity of this resolution may affect the amount of damages.

Then with regard to the third point, we have here a case in which the plaintiff has by the social contract into which she has entered agreed to adopt a particular tribunal for the purpose of determining the point which she asks to have determined in this action, and I do not hesitate to say that if this order had stood and if the action had come on for trial, as soon as the learned judge was informed of the nature of this social contract, it would have been his duty to say that he would not entertain this question at all. It would be perfectly useless to entertain it, because if he did so he would be acting as a Court whose jurisdiction the plaintiff had contracted to exclude. That last consideration convinces me

that, for determining the question whether the resolution was a valid resolution, which is the only question raised as between the plaintiff and the company, the forum conveniens is French, and French only, and not every tribunal in France, but the special tribunal which the parties have selected.

For all these reasons it seems to me, with all respect to the learned judge, that the order appealed from must be discharged and all the subsequent proceedings set aside with costs here and below.

Appeal allowed.

Solicitors for appellant company: *Alfred Bright & Sons, for Batesons & Co., Liverpool.*

Solicitors for respondent: *Kenneth Brown, Baker, Baker.*

W. I. C.

In re COWLEY SETTLED ESTATES.

[1926. C. 1658.]

Settled Land—Compound Settlement—Additional Powers in successive component Settlements—Life Tenant of last and therefore of compound Settlement—Right to exercise all additional Powers—Consent of last Settlement Trustees—Settled Land Act, 1925 (15 *Geo.* 5, *c.* 18), *s.* 1, *sub-s.* 1; *s.* 22, *sub-s.* 2; *s.* 108, *sub-s.* 2; *s.* 109.

By an 1888 settlement now only subsisting by virtue of jointures and a portion charged thereunder, additional powers in extension of the statutory powers were given to the person in whom the Settled Land Act powers should for the time being be vested.

By a 1914 resettlement other additional powers were given to the person for the time being entitled to exercise a life tenant's powers.

Both sets of these additional powers might prejudicially affect the security of the jointures and portion, but it was expressly provided that no non-statutory investment or application of capital money under the additional powers of the 1914 resettlement should be made without the consent of the 1914 resettlement trustees.

The life tenant of the 1914 resettlement, though never a life tenant under the 1888 settlement, claimed as life tenant of the compound settlement, consisting of those deeds and an intermediate deed of disentail, to exercise both sets of additional powers without any consent:—

Held, that the life tenant was entitled to exercise both sets of additional powers, they having become statutory powers under s. 109 of

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the Settled Land Act, 1925, and the jointresses and portioner being fully protected by the fact that the life tenant being a trustee for them under s. 107, sub-s. 1, could only exercise his powers fiduciarily and after notice to the compound settlement trustees under s. 101, sub-s. 1.

In re Hunt's Settled Estates **[1905] 2 Ch. 418; [1906] 2 Ch. 11 applied.**

But *held* that any non-statutory investment or application of capital money under the additional powers of the 1914 resettlement required the consent of the 1914 resettlement trustees.

ORIGINATING SUMMONS.

By a settlement dated June 9, 1888, and made between the second Earl Cowley of the first part, his only son afterwards the third Earl of the second part, Collyer-Bristow and Russell of the third part, and Hill and Williams of the fourth part, the second and third Earls in exercise of a joint power of appointment appointed the freehold portions of the Cowley estates upon such trusts as they should jointly appoint and subject thereto upon trust that the third Earl should during the joint lives of himself and his father receive certain annual sums and subject thereto upon trust for the second Earl for life in restoration of his estate under a previous will-settlement and after his decease upon trust for Hill and Williams for the term of 999 years upon the trusts hereinafter declared and subject thereto upon trust limiting a 2000*l.* jointure to the second Earl's wife and subject thereto upon trust for the third Earl for life with remainder to his sons successively according to seniority in tail male. The trusts of the 999 years term were to raise a portion of 20,000*l.* for the second Earl's daughter, which portion was duly raised and paid. The third Earl was empowered to charge jointures and portions. It was agreed that it should be lawful for the person or persons in whom the powers of the Settled Land Act, 1882, should for the time being be vested in relation to the hereditaments thereby appointed or for the time being subject to the uses or trusts of the 1888 settlement to exercise over or in relation to the same certain additional powers by way of extension or enlargement of the statutory powers. These additional powers included provisions that fines received on the renewal of leases and also mining rents should be income. It was also agreed that the

provisions of the Settled Land Act, 1882, should be extended so as to authorize the investment of capital moneys arising under the 1888 settlement or that Act in the wide range of securities therein specified, or their application (inter alia) in substantial repairs of the mansion house and farm or other buildings, and so on. The leasehold portion of the estates was settled on corresponding trusts, and Collyer-Bristow and Russell were appointed Settled Land Act trustees.

The second Earl died on February 28, 1895.

By a deed of disentail dated April 2, 1912, the third Earl and his eldest son the fourth Earl, then Viscount Dangan, disentailed the estates and capital moneys and limited them to such uses or upon such trusts as they should jointly appoint and subject thereto upon the trusts and subject to the powers and provisions upon which they were held immediately before the disentail and so as to restore and confirm those powers and provisions.

By a deed poll of July 11, 1914, the third Earl appointed a jointure of 1200*l.* a year to his second wife.

By a resettlement dated March 31, 1914, and made between the third Earl of the first part, the fourth Earl of the second part, Nevill and Whatton (thereinafter called the "Dangan trustees") of the third part, and Baron Colebrooke, Buxton and Nevill (thereinafter called the "settlement trustees") of the fourth part, the freehold portions of the Cowley estates were appointed subject to the existing incumbrances upon trust that the Dangan trustees should receive certain annuities during the joint lives of the third and fourth Earls and subject thereto as those Earls should jointly appoint and subject thereto upon trust for the third Earl for life in restoration of his life estate under the 1888 settlement with all the powers incident thereto with remainder upon trust for the Dangan trustees during the fourth Earl's life without impeachment of waste upon trust to enter upon and manage the said hereditaments and apply the income upon a discretionary trust for the fourth Earl his wife or issue. The Dangan trustees had absolute discretion to permit the fourth Earl to occupy any of the premises and to delegate to him

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their right of possession and management, or if they thought it expedient to appoint the premises to him as life tenant. And it was declared that notwithstanding anything hereinbefore contained, nevertheless for the purposes of all the powers of the Settled Land Acts, 1882 to 1890, and of all Acts extending or amending the same (including the extension of any such powers contained in the 1914 settlement), and for the purposes of all powers of jointuring or charging portions therein contained, the fourth Earl should be in the like position as if instead of the limitations in favour of the Dangan trustees the premises had been limited in remainder after the third Earl's death upon trust for the fourth Earl during his life without impeachment of waste. The next remainder was to the fourth Earl's sons successively according to seniority in tail male with divers remainders over.

By clauses 40 and 41 the fourth Earl was given powers of jointuring and charging portions.

By cl. 42 the expression the "Settled Land Acts" meant the Settled Land Acts, 1882 to 1890, and any Acts amending or re-enacting the same, and by cl. 43 the settlement trustees were appointed Settled Land Act trustees.

By cl. 52 the person or persons for the time being entitled to a life tenant's powers under the Settled Land Acts were given additional powers by way of extension or enlargement of those powers, and with the like incidents, effects and consequences as if the additional powers had been conferred by those Acts. These additional powers included power to give a lessee an option of purchase, powers to grant easements, and so on.

By cl. 53 the provisions of the Settled Land Acts were extended so as to authorize the investment of capital moneys arising under the 1914 settlement or those Acts in the wide range of securities therein specified, "provided that no investment which would not in the absence of this paragraph be authorized by the Settled Land Acts shall be deemed an investment hereby authorized unless the settlement trustees consent thereto."

By cl. 56 capital moneys arising under the 1914 settlement

or the Settled Land Acts might in addition to any modes of investment or application authorized by the Settled Land Acts or the 1914 settlement, be applied (inter alia) in repairs of the mansion house or outbuildings or other dwelling-house or any farm or other buildings for the time being subject to the 1914 settlement and so on "Provided . . . . that capital moneys shall not be invested or applied under or by virtue of this present paragraph in any manner or for any purposes other than or in extension of the manner or purposes in which or for which such capital moneys could under the Settled Land Acts alone be invested or applied unless the settlement trustees in their absolute discretion consent to such investment or application or unless failing such consent the same be approved by the Court."

By cl. 58 the provisions of clauses 47 to 57 were to apply to the 1888 settlement as if therein included, and so that all powers by such provisions respectively conferred on the trustees or any life tenant under the 1914 settlement might be exercised by the 1888 settlement trustees or (as the case might be) the third Earl as life tenant under the 1888 settlement, but so that as regards any investment made under the extended powers of cl. 53 the consent of the 1914 settlement trustees (and not of the 1888 settlement trustees) should be requisite, and as regards any expenditure under the extended powers of cl. 56, either the consent of the 1914 settlement trustees (and not of the 1888 settlement trustees) or the approval of the Court should be required.

By cl. 59 the leasehold portion of the estates was settled upon corresponding trusts, and by cl. 60 the capital moneys (less 100,000*l.* already raised and paid under the joint power of appointment) were settled upon such trusts and subject to such powers (including the joint power of appointment) and provisions as if they represented moneys arising from a sale of freeholds made after the 1914 settlement under the Settled Land Acts, but so as to be primarily liable to be invested in the purchase of freehold land to be assured to the uses of the 1914 settlement.

By a deed poll dated April 27, 1914, the third Earl appointed

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a portion of 20,000*l.* to his younger son if he attained twenty-one, with 800*l.* a year from the third Earl's death until payment.

The third Earl died on January 15, 1919, having by his will of July 11, 1911, appointed a jointure of 1500*l.* a year to his third wife, reducible to 300*l.* while the jointure of his former second wife (marriage dissolved) was still subsisting.

The charges now affecting the estates were the 2000*l.* jointure to the second Earl's widow, the 1200*l.* jointure to the third Earl's second wife, the 20,000*l.* contingent portion to the third Earl's younger son, with 800*l.* income until payment, and the 1500*l.* jointure to the third Earl's widow, of which only 300*l.* was at present payable.

On May 3, 1926, the 1888 settlement trustees issued this summons to determine :—

(1.) Whether the fourth Earl could exercise the additional powers of the 1888 and 1914 settlements or either of them.

(2.) Whether capital moneys now subject to the trusts of the 1914 settlement could be invested or applied by the fourth Earl's direction in any manner authorized by the Settled Land Act, 1925, or by the 1888 settlement or by the 1914 settlement, and in the last case whether the consent of the 1914 settlement trustees was necessary to any investment authorized by cl. 53 or any application authorized by cl. 56 and not authorized by the Settled Land Act, 1925.

(3.) A similar question as to capital moneys now subject to the 1888 settlement.

(4.) A similar question as to capital moneys hereafter to be received by the 1888 settlement trustees as trustees of the compound settlement.

(5.) Whether so long as the compound settlement existed all investments held under any document constituting that compound settlement ought to be held by the trustees of that compound settlement.

Archer K.C. and *H. T. Method* for the 1888 settlement trustees. We are the compound settlement trustees under s. 31, sub-s. 1, of the Settled Land Act, 1925, and the fourth

Earl is the life tenant of the 1914 settlement under s. 23, sub-s. 1, and s. 117, sub-s. 1 (xxviii.), and therefore of the compound settlement under the proviso to s. 1, sub-s. 1.

There is no doubt that he can exercise all statutory powers, but the exercise of the additional powers under either settlement might possibly prejudice the security of the jointresses and portioner. We therefore want to know whether the fourth Earl as life tenant under the compound settlement can exercise the additional powers of the 1888 and 1914 settlements, and in the latter case, whether the consent of the 1914 settlement trustees is necessary.

Topham K.C. and *P. M. Walters* for the fourth Earl and the Dangan trustees. The fourth Earl claims to exercise either set of powers without any one's consent. Of course he must exercise them as a trustee for all parties entitled under the compound settlement, including the jointresses and portioner: s. 107, sub-s. 1. But that is the only fetter.

These additional powers become statutory powers of the respective component settlements under s. 109, and therefore of the compound settlement under the proviso to s. 1, sub-s. 1; and notwithstanding anything in the particular settlement conferring them are exercisable by the life tenant simpliciter under s. 108, sub-s. 2. The imposition of the 1914 settlement trustees' consent is really in conflict with the statutory powers, and may therefore be disregarded. (1)

The decision of Sargant J. in *In re Duke of Westminster's Settled Estates* (2) on the corresponding ss. 56 and 57 of the 1882 Act may possibly throw some light on the present ss. 108 and 109.

There is no statutory definition of a compound settlement, but it is clearly a separate entity made up of the several component settlements: *In re Marquis of Ailesbury and Lord Iveagh* (3); *In re Mundy and Roper's Contract.* (4) There is no doubt that the life tenant of a compound settlement can exercise all the statutory powers of the component

(1) See *Earl of Lonsdale* v. *Lowther* [1900] 2 Ch. 687, 697.
(2) [1920] 2 Ch. 445.
(3) [1893] 2 Ch. 345.
(4) [1899] 1 Ch. 275, 295.

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settlements. Why should he not also exercise the additional powers, now made statutory? : *In re Cradock's Settled Estates.* (1)

[ASTBURY J. That case was decided under s. 22, sub-s. 2, where the original life estate was restored by the resettlement. If s. 109 applies to all compound settlements, s. 22, sub-s. 2, is to some extent redundant.]

That may be so, but the redundancy cannot affect the clear language of s. 109.

Errington for the jointresses and portioner, being engaged elsewhere, was allowed to interpose his argument at this point. The fourth Earl as life tenant under the compound settlement can exercise the actual statutory powers of both the component settlements. But he cannot as such exercise the additional powers of either. No additional powers are really given by the compound settlement. For those powers he must rely on the separate component settlements.

Now the fourth Earl was never life tenant under the 1888 settlement. There could therefore be no question of restoring him any life estate thereunder, and s. 22, sub-s. 2, has no application.

Sect. 108, sub-s. 2, does not touch the question of the 1888 settlement additional powers. It merely means that the 1914 settlement additional powers are exercisable by the life tenant as if validly conferred on him within s. 109. The proviso to s. 1, sub-s. 1, is quite general, and does not really carry this point any further. There is nothing therefore in the Act to enable the fourth Earl to exercise the additional powers of the 1888 settlement.

As to the additional powers of the 1914 settlement the matter is still clearer. Sect. 109 merely provides (sub-s. 1) that nothing in the Act "precludes" a "settlor" from conferring additional powers on the life tenant, and (sub-s. 2) that any additional powers so conferred shall, "as far as may be," operate and be exercisable as if they were conferred by the Act. The key to the section lies in the words "precludes," "settlor" and "as far as may be." A settlor can

(1) [1926] W. N. 179.

only settle property subject to his absolute dominion. The Act does not preclude him from doing that, but it does not enable him to do more.

In the present case the settlors of 1914 could only settle subject to the paramount charges, and the additional powers of the 1914 settlement could only be conferred subject to those charges. Subject thereto—i.e., "as far as may be"—they become statutory powers under s. 109, but that section can never have been intended to enable a settlor in any way to override paramount charges under the guise of creating additional powers. The fourth Earl cannot therefore exercise the 1914 settlement additional powers so as to affect the paramount charges.

Topham K.C. then continued his argument. The additional powers of the 1888 settlement were expressly given to the person in whom the Settled Land Act powers should for the time being be vested in relation to the hereditaments for the time being subject to that settlement. That clearly includes the present life tenant of the compound settlement.

As to the additional powers of the 1914 settlement, the Court should consider the independent statutory powers already existing. Sect. 73, sub-s. 1, permits the investment or application of capital moneys: (i.) in Government securities or in other securities authorized by the settlement or by law, and (xxi.) in any other mode authorized by the settlement; s. 75, sub-s. 2, provides that the investment or other application shall be made according to the direction of the life tenant; and s. 84, sub-s. 1, permits its application in any improvement authorized by the Act or the settlement without submitting a scheme.

These powers with or without the 1914 settlement additional powers are no doubt wide powers, but the jointresses and portioner are fully protected by the statutory safeguards. In the first place, the life tenant is a trustee for them under s. 107, sub-s. 1, and any directions for investment or application of capital money under s. 75, sub-s. 2, or s. 84, sub-s. 1, must clearly be given in his fiduciary capacity. Secondly, if he intends to make a sale, exchange, lease, mortgage or charge

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or to grant an option he must give notice to the trustees under s. 101, sub-s. 1, and as s. 109 makes the additional powers exercisable "in the like manner" as if conferred by the Act, he must also give notice of any intended exercise of those additional powers.

Any investment or application really against the interests of his cestuis que trust could be restrained: *In re Hunt's Settled Estates.* (1)

Horace Freeman for the 1914 settlement trustees. We are only concerned with questions 2 to 5. Now the capital moneys in question 2 can only have arisen from sales subject to the jointures and portion, which are still charged on the land and not on those capital moneys. Those moneys are therefore not subject to the compound settlement, and we can invest or apply them at the life tenant's direction under the 1914 settlement. If the investment or application directed is outside the Act our consent is necessary.

Topham K.C. I agree as to the moneys referred to in question 2.

Horace Freeman. The capital moneys referred to in questions 3 and 4 can be invested or applied by the compound settlement trustees at the life tenant's direction. But any non-statutory investment or application under the 1914 settlement additional powers requires our consent. Without that consent the investment or application is not authorized by s. 73, sub-s. 1 (i. or xxi.). These powers of investment or application are not really additional powers within s. 109: *In re Duke of Westminster's Settled Estates.* (2)

As to question 5 the present investments should stay where they are. Investments of future moneys should be held by the compound settlement trustees.

Topham K.C. in reply. I agree as to question 5, but I still contend that no consent of the 1914 settlement trustees is necessary as to the investment or application of the capital moneys referred to in questions 3 and 4.

(1) [1905] 2 Ch. 418; [1906] 2 Ch. 11; compare *In re Gladwin's Trust* [1919] 1 Ch. 232.

(2) [1920] 2 Ch. 445, 450.

ASTBURY J. [after stating the facts :] The first question is whether the fourth Earl, who has the powers of a life tenant under the 1914 settlement, is entitled to exercise in respect of the settled estates, which are subject to the paramount interests surviving under the 1888 settlement, the additional powers of the 1888 and 1914 settlements. The difficulty of deciding this is very considerable.

The fourth Earl has a life tenant's powers under s. 23, sub-s. 1, which provides that where under a settlement there is no life tenant nor, independently of this section, a person having by virtue of this Act the powers of a life tenant then : (*a*) " any person of full age on whom such powers are by the settlement expressed to be conferred. . . . ." shall have the powers of a life tenant under this Act.

Sect. 108, sub-s. 2, which is in part a repetition of s. 56 of the 1882 Act, and in part contains fresh matter, provides that in case of conflict between the provisions of a settlement and the provisions of the Act, the provisions of the Act as therein stated shall prevail, and, notwithstanding anything in the settlement, any power relating to the settled land thereby conferred on the settlement trustees or other persons exercisable for any purpose, whether or not provided for in the Act, shall, after the commencement of the Act, be exercisable by the life tenant or statutory owner as if it were an " additional power conferred " on the life tenant within the next following section, and not otherwise.

For the purposes of these sections the fourth Earl must now be considered as a person in the position of a life tenant.

Sect. 109, based in part on s. 57 of the 1882 Act, provides (sub-s. 1) that nothing in this Act precludes a settlor from conferring on the life tenant, or (save as provided by the last preceding section) on the settlement trustees, any powers additional to or larger than those conferred by this Act ; and (sub-s. 2) that any additional or larger powers so conferred shall, as far as may be, notwithstanding anything in this Act, operate and be exercisable in the like manner, and with all the like incidents, effects, and consequences, as if they were

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conferred by this Act, and, if relating to the settled land, as if they were conferred by this Act on the life tenant.

Sect. 22, sub-s. 2, provides that: "Where by a resettlement of settled land any estate or interest therein is expressed to be limited to any person (whether subject or not to any estate, interest, charge or power expressly created or conferred by the resettlement) in restoration or confirmation of his estate or interest under a prior settlement, then, for the purposes of this Act and otherwise, that person is entitled to the estate or interest so restored or confirmed as of his former estate or interest, and in addition to the powers exercisable by him in respect of his former estate or interest, he is capable of exercising all such further powers as he could have exercised by virtue of the resettlement, if his estate or interest under the prior settlement had not been so restored or confirmed, but he had been entitled under the resettlement only."

Now it has been suggested in argument that s. 22, sub-s. 2, implies a restriction on the fourth Earl's exercise of the additional powers conferred upon him by the 1888 and 1914 settlements, because he was not restored by the 1914 settlement to any life interest which existed under the 1888 settlement, as he had no such interest. Sect. 1, sub-s. 1, however, contains this proviso: "Provided that, where land is the subject of a compound settlement, references in this Act to the settlement shall be construed as meaning such compound settlement, unless the context otherwise requires." Now whatever be its effect, I understand this proviso to mean that where there is a compound settlement existing after the date of this Act, powers and provisions contained in the Act in respect of a settlement shall be deemed to apply to the compound settlement, unless the context of the Act otherwise requires.

The Act does not provide that "settlement" shall include "compound settlement" where it is advisable, or where that construction will not effect any injury or risk to any other person, but it provides that "settlement" shall include "compound settlement," unless the context otherwise requires. In various sections to which I have been referred and in which

certain provisions relative to this matter now under consideration are contained, I can find no context in the Act requiring a different or any more limited construction. Sect. 22, sub-s. 2, is the only instance where the context requires that the "settlement" therein referred to shall, as therein expressly stated, refer to one only or to less than all of the documents constituting a compound settlement. But there is no such necessary context or requirement in respect of the other sections relied on, and in particular in ss. 108, 109.

The jointresses and portioner under the 1888 settlement contend with considerable force that it is unreasonable to suppose that the 1914 settlement settlors should under the extended powers therein given—i.e., powers in addition to the statutory powers—have power to prejudice their security existing under the 1888 settlement. They contend that the word "settlor" in s. 109 ought to be limited to a person settling property that he has a power and legal right to settle, and cannot be applied to the 1914 settlement settlors, so as to enable them to create powers over the settled land in such a way as to defeat, prejudice, or interfere with the paramount interests under the 1888 settlement, or, in other words, their powers of settlement were limited to the property over which they had dominion or disposing power. It is not of the least importance what I think would be a wise construction. I have to take the Act as it stands, and s. 1, sub-s. 1, says that "settlement" shall include a compound settlement (if any), unless the context otherwise requires. The 1888 and 1914 settlements and the disentail of 1912 unquestionably create a compound settlement, and when s. 109 says that any additional or larger powers conferred by a settlor shall be exercisable as if conferred by the Act, I am bound to give effect to those clear words. Here there are a compound settlement, a settlor, and additional powers granted or conferred, and there is no context requiring me to confine s. 109 and other sections relative to this case to anything less than that compound settlement, of which the 1888 settlement trustees became Settled Land Act trustees under s. 31, sub-s. 1.

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Therefore, notwithstanding the eminently reasonable argument of the jointresses and portioner to which I should like to have given effect, I am of opinion that having regard to the provisions of the Act I am prevented from holding that the fourth Earl, as life tenant under the compound settlement, is not entitled to exercise the additional powers of the 1888 and 1914 settlements.

Having regard to the statutory safeguards, the matter is perhaps not very serious. Before dealing with these safeguards I ought to say that the fourth Earl, as life tenant of the compound, is admittedly entitled to exercise all the statutory powers of either settlement. The only question is whether he is entitled to exercise the additional powers conferred by the two settlements, and I hold that he is so entitled.

The statutory safeguards are as follows:—

Sect. 101, sub-s. 1, requires a life tenant intending to make a sale, exchange, lease, mortgage, or charge or to grant an option to give notice of that intention to each of the trustees and their solicitor. So that no transaction of that character can take place without the trustees' knowledge.

Sect. 107, sub-s. 1, provides that a life tenant shall, in exercising any power under this Act—including, of course, any additional power conferred under s. 109—have regard to the interests of all parties entitled under the settlement, and shall, in relation to that exercise, be deemed to be in the position and to have the duties and liabilities of a trustee for those parties. Now the jointresses and portioner under the 1888 settlement are, of course, within the meaning of this section, parties entitled under the compound settlement, and the life tenant in exercising his powers must have regard to their interests and exercise those powers in a fiduciary manner.

As regards the additional powers of investment, s. 73, sub-s. 1, provides that capital money shall be invested or otherwise applied: (i.) in investment in Government securities, or in other securities in which the settlement trustees are by the settlement or by law authorized to invest trust money of the settlement; and (xxi.) in any other

mode authorized by the settlement with respect to money produced by the sale of the settled land. I feel bound to read the word "settlement" there as including a compound settlement.

Sect. 75, sub-s. 2, provides that the investment or other application [of capital money] by the trustees shall be made according to the life tenant's direction.

Now the rule laid down in *In re Hunt's Settled Estates* (1) applies to the present Act. It was there held that a life tenant directing the investment of capital moneys under the Settled Land Act is in the same position as an ordinary trustee with a discretionary power of investment, and that the Court will restrain him from directing an investment not suitable for the investment of trust funds, though within the words of the power given by the Act, in the same circumstance in which it would so restrain an ordinary trustee.

It is quite plain therefore that if the fourth Earl were to attempt to exercise the additional powers of the 1914 settlement in any way to the prejudice of the parties interested under the 1888 settlement they would be sufficiently protected by ss. 101 and 107 and the above decision. It seems to me therefore that the fourth Earl, as life tenant of the compound settlement, is entitled to exercise the additional powers of the 1888 and 1914 settlements, including the additional powers of investment and application of capital money.

The second question is less difficult. Before the Act there were no compound settlement trustees. They only came into existence by virtue of s. 31, sub-s. 1. The moneys referred to in question 2 must therefore have been proceeds of sale of incumbered lands. The incumbrances remained on the land, and did not affect the capital moneys paid to the 1914 settlement trustees. They must therefore invest or apply them according to the life tenant's direction under the Act and the 1914 settlement, but their consent is necessary to any investment or application outside the Act.

The capital moneys referred to in questions 3 and 4 must be invested or applied at the life tenant's direction in

(1) [1905] 2 Ch. 418; [1906] 2 Ch. 11.

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any manner directed by the Act or the two settlements, but if the 1914 settlement additional powers are invoked the consent of the 1914 settlement trustees will be necessary.

As to question 5 all past moneys must be held by the appropriate trustees in the way I have directed, but all fresh capital moneys which come into existence must be paid to the trustees of the compound settlement so long as it subsists.

Solicitors: *Collyer-Bristow & Co.; Waltons & Co.*

G. R. A.

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In re HEWITT.

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[1926. H. 645.]

Will—Construction—Trust to pay Income to One for Life "until she shall take the veil"—Words of Futurity—Reference of Words of Limitation to Occurrence of Event after Execution of Will.

A testator by his will dated April 29, 1912, devised and bequeathed the residue of his real and personal estate upon trust for sale and conversion and investment and directed his trustees to stand possessed of his residuary estate upon trust to pay three-fiftieths of the income thereof to his niece E. H. for life "or until she shall take the veil." At the time he made his will the testator was aware that E. H. contemplated becoming a professed nun and that such a step would involve her taking a vow of poverty, with the consequence that she would be deprived of the personal enjoyment of any bounty which he might bestow upon her by his will. On September 16, 1913, E. H. became a professed nun, and on March 9, 1920, the testator died:—

Held, that having regard to the facts—of which the testator was aware—and to the absence of a context limiting the occurrence of the event to the period after the testator's death, the word of futurity in the limitation of the gift of income to E. H. was referable to its occurrence after the execution of the will and not merely to its occurrence after the testator's death, and that accordingly the gift to E. H. failed.

ADJOURNED SUMMONS.

John Henry Hewitt, of Maugersbury Manor, Stow-on-the-Wold, in the county of Gloucester, made his will dated April 29, 1912, and after appointing executors and trustees

thereof and bequeathing a number of pecuniary legacies, devised his Maugersbury estate in the county of Gloucester to his trustees upon trust for his wife during her life and then directed that his trustees should hold that estate to the use of his first and other sons successively in remainder one after the other according to their respective seniorities in tail male with divers remainders over. The testator then devised and bequeathed all the residue of his real and personal estate not thereby otherwise disposed of to his trustees upon trust to sell his real estate and certain scheduled securities and to invest the proceeds and upon further trust to retain the residue of his personal estate upon the investments in which the same were invested at the time of his death and directed his trustees to stand possessed of the residuary trust fund upon trust to pay three-fiftieth parts of the income thereof to his niece Ethel Hewitt during her life or "until she shall take the veil" and to pay the rest of the income in certain other definite proportions to his nephews and nieces and his wife and sister during their respective lives. And the testator directed that the income set free by the death or deaths from time to time of any of the persons to whom the income of his residuary trust fund had been bequeathed should form part of his residuary trust fund and declared that the trustees should stand possessed of his residuary trust fund upon trusts corresponding with or similar to the limitations thereinbefore contained in respect of his Maugersbury estate so far as the rules of law and equity would permit and as if the same were capital moneys arising from the sale of such estate under the Settled Land Acts.

On August 14, 1905, Ethel Hewitt was received into the Roman Catholic Church. On October 3, 1905, she went into a convent at Bruges. During the time she was there she corresponded with the testator, and from time to time visited him at his home during her holidays. On January 18, 1912, she entered upon her novitiate at the Dominican convent at Stone, having previously informed the testator of her intentions. On September 16, 1913, she made her

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profession, or in colloquial language, she took the veil. On March 9, 1920, the testator died.

This summons was taken out by the testator's widow (who since his death had been married to Mr. Thomas Walker Hewitt), as trustee of the will and tenant for life of the Maugersbury estate, for the determination of the question, amongst others, whether in the circumstances Ethel Hewitt was entitled during her life to the share of the income bequeathed to her.

Jenkins K.C. and *Alfred Adams* for the plaintiff. There are no sufficient indications in the will to take this case out of the rule that, prima facie, with reference to the event in question, the will speaks as from the date of its execution. It was known to the testator when he made his will that his niece had entered on her novitiate, and before his death she had actually become a professed nun. Therefore she was no more entitled to receive the income than if she had failed to survive the testator. In the case of *In re Chapman* (1) there were strong indications that the marriage referred to was marriage after the death of the testator.

E. P. Hewitt K.C. and *R. G. Nicholson Combe* for the defendant Ethel Hewitt. There is no hard and fast rule applicable to cases of this nature that the will must speak from the date of its execution. It depends upon the language used and upon the words of the will as a whole. In the present case the testator was referring to something which might take place after his death. In *In re Chapman* (1) there are expressions in the judgments which are favourable to our contention, and the forfeiture provision in that case was read as having no application to an event occurring between the date of the will and the death. The facts in that case are no doubt different, the chief difference being that the will contained a declaration that, on the happening of the event, the interest given was to "determine." Forfeiture clauses on bankruptcy or the like form a class by themselves and apply to a bankruptcy before the death and even before the

(1) [1904] 1 Ch. 431; [1905] A. C. 106.

date of the will, although the words are future. But, except in this class of cases, a forfeiture or disqualification provision, where the words are future, will be confined to an event occurring after the death of the testator, at which date the will comes into operation. The terms of the will contemplate that the interest will begin to be payable, but that such payment will cease on the happening of some event—that is on its happening after the death. The clause was intended to act as a deterrent, and it could only so act after the contents of the will became known and the will itself became operative by the death of the testator.

George P. Slade, *Owen Thompson K.C.* with *F. D. Morton* and *Farwell K.C.* with *C. R. R. Romer* for other parties interested in the destination of the income set free by reason of the defendant Ethel Hewitt having taken the veil.

LAWRENCE J. The testator at the date when he made his will was aware that his niece, Ethel Hewitt, contemplated becoming a professed nun, and that such a step would involve her taking a vow of poverty, with the consequence that she would thereby be deprived of the personal enjoyment of any bounty which the testator might bestow upon her by his will. With these matters in mind the testator made his will on April 29, 1912, and thereby directed his trustees to hold three-fiftieths of the proceeds of sale and conversion of his residuary real and personal estate upon trust for his niece Ethel Hewitt during her life or until she took the veil. On September 16, 1913, Miss Ethel Hewitt made her profession in the Dominican Convent, and therefore took the step which the testator describes as taking the veil. The testator died on March 9, 1920, and the question now arises whether Ethel Hewitt is entitled for the rest of her life or until she should again take the veil to the three-fiftieth parts of the income of the testator's residuary estate. The solution of that question, in my opinion, depends upon whether the words of futurity which the testator has used speak from the date of the making of his will or from the date of his death. Prima facie, words of futurity have reference to the date of the will; but, as has

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been said in many cases, the context in which such words are used may show that the testator intended them to speak only as from the date of his death. In the present case I have come to the conclusion that the testator intended the words of futurity to bear their primary meaning, and consequently that they are referable to the date of his will and not to the date of his death. It appears to me to be evident on the face of the will that the testator intended that, if Ethel Hewitt should become a professed nun and thereby be deprived of the personal enjoyment of her share of the income of his residuary estate such share should not be payable to her. It is to be observed, moreover, that the bequest in her favour is framed not so as to give her a life interest with a proviso for forfeiture or cesser in the event of her taking the veil, but is in the form of a limitation until she should take the veil. It was said that that is a distinction without a difference, but I think the particular frame of the bequest tends to bear out my view of the construction of the will.

Mr. Hewitt and Mr. Combe have relied upon *In re Chapman*. (1) In that case there was a gift to a spinster for life with a proviso for forfeiture in the event of her marrying in contravention to a prohibition contained in the will. The majority of the Court of Appeal came to the conclusion that, although words of futurity should, prima facie, be read as speaking from the date of the will and not from the death, yet the will in that case contained strong indications that the words of futurity there used were intended to be referable to the date of the testator's death : amongst other indications, the frame of the gift was to make the interest cease and determine, and the event upon which the interest was to cease was marriage without the consent of the trustees of the testator's will, which could of course only come into effect after the testator's death.

In the present case it is contended that a similar presumption ought to be made, because the net proceeds of the residuary estate, to the enjoyment of a share of which Ethel

(1) [1904] 1 Ch. 431 ; [1905] A. C. 106.

Hewitt would become entitled, could only have come into being after the death of the testator. It is of course obvious that no will becomes operative until after the death of the testator; and, therefore, all the directions for realization of the testator's estate are necessarily referable to what is to happen after his death; but that does not, in my opinion, in the least conflict with the admitted rule that words of futurity in a gift contained in a will are ordinarily speaking referable to the date of the instrument in which they are contained. In the present case, as I have already said, I think that the will shows that the object which the testator had in mind was that Ethel Hewitt should enjoy the income personally, and that she was not to have it if she should take the veil and deprive herself of its enjoyment, and I can find nothing in the will to show that the testator intended her in any event to have that income on his death, whether she had taken the veil or not, or that her enjoyment was only to cease if she should take the veil after his death. Mr. Combe stated that it was possible that Ethel Hewitt might again take the veil after the testator's death. There is no evidence whether such a step could be repeated at any future date. But be that as it may, the ground of my decision is that the words of futurity in this case have reference to the date of the will, with the result that Ethel Hewitt never became entitled to the bequest in her favour, because the event which marked the limit of that bequest had happened before the will became operative, and consequently the period during which alone the income was to be paid to her had then already expired.

[It was further held that, according to the scheme of the will of the testator, the income set free by the failure of the trust of the three-fiftieths of the income in favour of Ethel Hewitt ought not to be accumulated until the deaths of all the persons entitled to the income, for the benefit of some person who might then eventually become entitled to the Maugersbury estate in fee simple in possession, but must be treated as income of the residuary trust fund: and, subject to the disposition of income in the various proportions specified

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in the will the residuary trust fund was to be treated as capital moneys under the Settled Land Acts, as if it had arisen from the sale of part of the Maugersbury estate.]

Solicitors: *Bell, Brodrick & Gray, for Jones & Carr, East Retford; Prideaux & Sons; Rawle, Johnstone & Co., for E. W. Hewitt, Hull.*

H. C. H.

TOMLIN J. 1926 *April* 27; *May* 13.

DUKE OF SUTHERLAND *v.* BRITISH DOMINIONS LAND SETTLEMENT CORPORATION, LIMITED.

[1925. S. 4342.]

Practice—Interrogatories—Company—Refusal to register Transfer—Limited Power to do so under Articles—Interrogatories directed to ascertaining Grounds for Refusal—Bona fides.

Art. 27 of a company's articles of association was as follows: "The Directors may without assigning any reason, decline to register any transfer of shares not fully paid up made to any person not approved by them or made by any member jointly or alone indebted or under any liability to the company." The plaintiff was the holder of 10,000 partly paid cumulative preference shares of 1*l.* each in the company, and in December, 1925, executed a transfer of 8000 of these shares to a transferee. Registration of the transfer was refused, and the plaintiff brought this action claiming a declaration that the defendant company was not entitled to refuse registration of the transfer and rectification of the company's register accordingly. Earlier in 1925 the company had issued debentures secured by a debenture trust deed, in which the company covenanted with the trustees that it would not in regard to 100,000 preference shares register until the shares were fully paid any transfer of any of them to any proposed transferee not approved by the trustees, and would not, except with the previous written consent of the trustees, release any of the holders of these shares from any moneys payable or which might become payable in respect of such shares. The plaintiff alleged by his statement of claim that the defendant company had wrongfully refused to register the transfer, that the directors did not exercise any proper discretion under the articles, and that they had abdicated their discretion by entering into the above covenant with the trustees. The defendants by their defence claimed to have exercised the discretion under the article bona fide.

The plaintiff now sought to interrogate the defendant company by asking:—

(1.) Whether the company said that the directors had declined registration in exercise of the power to decline to register any transfer

made to any person not approved by them or in exercise of the power to decline to register any transfer by a member jointly or alone indebted to the company;

(2.) Whether they said that the transfer was to a person of whom the directors did not approve;

(3.) Whether they said the plaintiff was in fact a person jointly or alone indebted to the company;

(4.) Whether the debenture trust deed was referred to by any one at any meeting at which the question of registering the transfer was discussed.

The Master had allowed requisition three, but refused the remainder:—

Held, that all the interrogatories were proper to be allowed. The defendant company was not entitled to refuse to state which of the grounds mentioned in the article the directors had acted under, although it might refuse to say what reasons influenced them in exercising their discretion upon that ground.

PROCEDURE SUMMONS.

This summons was taken out by the plaintiff, the Duke of Sutherland, in an action by him against the defendant company and Lieutenant-Colonel Walter Grant Morden claiming to administer certain interrogatories to the defendant company.

The action was brought by the plaintiff claiming: (1.) a declaration that the defendant company was not entitled to decline to register a transfer made by the plaintiff in favour of the defendant Morden of 8000 7½ per cent. cumulative preference shares of 1*l.* each in the capital of the company, and (2.) An order that the register of members of the defendant company should be rectified by the deletion of the plaintiff's name as holder of the 8000 shares, and by the insertion in lieu thereof of the name of the defendant Morden.

By his statement of claim the plaintiff alleged that the defendant Morden took an active part in the promotion of the defendant company, which was registered as a private company on July 25, 1924, and became a public company on September 11, 1924, and now had a capital of 750,000*l.* divided into 250,000 preference shares of 1*l.* each and 500,000 ordinary shares of 1*l.* each; that this defendant was an alternate director of the company, and was at all material times a member of the company's finance committee, and in these capacities attended all or the majority of the directors'

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meetings; and that he was at all material times the holder of 3000 preference shares of the company, and gave a guarantee to the defendant company to secure an overdraft.

By an amendment to the articles of association of the company, made on September 11, 1924, it was provided as follows:—

"The following article shall be substituted for art. 27, namely: The directors may, without assigning any reason, decline to register any transfer of shares not fully paid up made to any person not approved by them or made by any member jointly or alone indebted or under any liability to the company."

The defendant company made an issue of debentures to the amount of 450,000*l.* secured by a debenture trust deed dated May 25, 1925.

By cl. 5 of this deed the defendant company assigned to the trustees of the deed (amongst other things) "all that the right to sue for recover and receive and give a good discharge for all moneys up to and not exceeding 80,000*l.* due and to become due in respect of the first 100,000 preference shares of the company which are allotted from time to time by the company which moneys are to be held by the trustees upon the trusts hereinafter declared concerning the same." And by cl. 8 the company covenanted with the trustees "That it will as and when the same become respectively payable under the terms of the applications that have been made therefore call up and if requested by the trustees recover payment of and immediately after the receipt thereof pay to the trustees all moneys payable in respect of" the above 100,000 shares "except such sums not exceeding in the whole 20,000*l.* as the company may desire to retain . . . . and that it will not until the same are fully paid register any transfer of any of the said shares . . . . to any proposed transferee not approved by the trustees and will not except with the previous written consent of the trustees forfeit any of the said shares or release any of the holders thereof from any moneys payable or which may become payable in respect of such shares."

In or about December, 1924, the plaintiff became the

registered holder of 10,000 preference shares of the company, which were shares not fully paid, but he alleged that he had duly paid all calls made in respect of them. On December 10, 1925, the plaintiff's solicitors presented to the defendant company a transfer of 8000 of these preference shares executed by himself and the defendant Morden in favour of the defendant Morden, and requested the company to accept and register this transfer. On October 1, 1925, the company refused to register the transfer.

By clauses 8 and 9 of the statement of claim the plaintiff alleged that the defendant company had wrongfully refused to accept or register the transfer, that the directors of the company did not exercise a proper or any discretion in refusing to accept or register the transfer, that he was not under any liability to the defendant company, and that the defendant Morden was not a person whom they could reasonably approve as the holder of these shares; and he alleged that the directors by entering into the agreement mentioned above in the debenture trust deed had abdicated their discretionary position, and made it impossible for themselves to exercise a proper or any discretion.

By cl. 8 of the defence the defendant company admitted that the transfer of 8000 preference shares was presented for registration, and by cl. 9 the defendant company denied that the directors had not exercised a proper discretion in declining to register the transfer, and alleged that they resolved to decline to register such transfer in pursuance of their powers under art. 27 of the articles of association and without having consulted the debenture trustees, and that in so resolving the directors had exercised a proper discretion and were acting solely in the interests of the defendant company.

In these circumstances the plaintiff sought to administer to the defendant company the following interrogatories: "1. Do you say that the directors of the defendant company declined to register the transfer of 8000 preference shares mentioned in para. 8 of the defence herein in exercise of the power to decline to register any transfer of shares not fully paid up made to any person not approved by them or in the

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exercise of the power to decline to register any transfer of shares not fully paid up made by any member jointly or alone indebted or under any liability to the company or do you say that they so declined in exercise of both the said powers ?

2. Do you say that the defendant Lieutenant-Colonel Walter Grant Morden, M.P., was in fact a person of whom the directors did not approve as a transferee of the 8000 shares mentioned in para. 8 of your defence herein ?

3. Do you say that the plaintiff was in fact a person who was either jointly or alone indebted or under a liability to the defendant company, and if yes, under what debt or liability was the plaintiff to the defendant company ?

4. Was the trust deed mentioned in para. 5 of your defence herein mentioned or brought forward or referred to [by any and what person who was present] at any and what [Board] meeting [or at any meeting of any and which] of [the] directors of the defendant company, at which the question of agreeing or refusing to register the transfer of the 8000 shares mentioned in para. 8 of your defence was discussed [by any and which members of the Board of directors of the defendant company] ? "

On the matter coming before the Master he refused the application to administer interrogatories except interrogatory No. 3. The plaintiff now claimed to be entitled to administer all the above interrogatories.

Greene K.C. and *St. John Field* for the plaintiff. The plaintiff's case in the action is that the directors of the defendant company did not exercise the discretion to refuse registration of a transfer conferred on them by art. 27. The defendant company claim that they did. Under art. 27 there are two different grounds on which the discretion can be exercised, and the first three interrogatories which the plaintiff asks liberty to administer are directed to ascertaining on which ground the defendant company claims to have acted. Further the plaintiff's case is that the directors have given up their discretion by virtue of the covenant

contained in the debenture trust deed, and the last interrogatory is directed to ascertaining whether regard was had to the obligation in the trust deed in refusing registration.

[TOMLIN J. I think the fourth interrogatory goes further than I should be prepared to sanction.]

The plaintiff is willing that this interrogatory should be modified by omitting certain words in it. (1) The Master had allowed the third interrogatory, but refused the remainder. The Court is asked to allow the whole of them. The principle governing the granting of interrogatories was discussed in *Attorney-General* v. *Gaskill* (2), and it was laid down that a party has a right to interrogate with a view to obtaining an admission from his opponent of everything which is material and relevant to the issue raised. Applying that to the present interrogatories, they are all proper to be allowed.

J. B. Lindon for the defendant company. The Master was right in refusing all except the third interrogatory, which was allowed, because in the defence a special claim had been set up that the plaintiff was indebted to the company. The company has pleaded that the directors have exercised their discretion under art. 27, and this is all that the plaintiff is entitled to know. It is well settled that directors need not assign reasons for the exercise of their discretion: *In re Gresham Life Assurance Society* (3); *In re Bell Brothers, Ld.* (4) This is so even when the power to refuse registration is exercisable under the article only on particular grounds: *In re Coalport China Co.* (5); *In re Bede Steam Shipping Co.* (6), *In re Hannam's King* (*Browning*) *Gold Mining Co.* (7): see also Buckley on Companies, 10th ed., p. 40.

[TOMLIN J. In a case where the directors' bona fides are impugned, must they not explain their reasons?]

Not at any rate before the trial of the action. Art. 27 gives the directors a single power, which they claim to have

(1) This interrogatory was then altered by omitting the portions shown in square brackets above.
(2) (1882) 20 Ch. D. 519, 528.
(3) (1872) L. R. 8 Ch. 446.
(4) (1891) 65 L. T. 245.
(5) [1895] 2 Ch. 404.
(6) [1917] 1 Ch. 123.
(7) (1898) 14 Times L. R. 314.

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exercised. It is exercisable, it is true, on two different grounds, but it is a single power. The ground on which the directors acted is part of the defendants' case, and cannot be the subject of interrogation. Under the very words of art. 27 it is expressly provided that the reasons of the refusal to register need not be given. The plaintiff is really seeking by these interrogatories to shift the burden of proof. They are not relevant to the issue between the parties, which is not whether the directors acted under one branch or the other of the article, but whether they acted under the article at all. The first two requisitions are not therefore proper to be put: *In re Howel Morgan* (1); *Kennedy* v. *Dodson* (2); *Lever Brothers* v. *Associated Newspapers*. (3)

Again the fourth interrogatory is entirely irrelevant to any issue in this case. The only issue in connection with the debenture trust deed is whether the defendant company by entering into a particular agreement have bound their hands, so that the discretion under art. 27 could not be properly exercised. It is irrelevant to that issue what passed at any Board meeting of a subsequent date and whether at such a meeting the trust deed was mentioned.

Greene K.C. in reply. As regards the fourth interrogatory, it must be material to know whether the directors were influenced by the debenture trust deed in refusing registration. Otherwise it might be said that they in fact acted without giving consideration to any obligation under the deed.

Again the onus is no doubt upon the plaintiff to show that the defendants did not act bona fide under the article, but this does not mean that the plaintiff is not entitled to know the defendant company's case. The cases that have been cited to show that directors need not give reasons for the exercise of their discretion are all cases where it was contended that as the directors had refused at the trial to give reasons for the exercise of their discretion, this in itself was evidence that they had acted mala fide and that it was not therefore necessary for the plaintiff to prove mala

(1) (1888) 39 Ch. D. 316. (2) [1895] 1 Ch. 334, 340.
(3) [1907] 2 K. B. 626, 629.

fides affirmatively. It was held in those circumstances that the directors were not bound to go into the box and state their reasons. The decisions have nothing to do with interrogatories.

TOMLIN J. This is an application by the plaintiff in the action for liberty to administer certain interrogatories to the defendant company. [His Lordship then stated the nature of the action as shown by the pleadings and of the four interrogatories sought to be administered and continued :] Of those interrogatories the third interrogatory, relating to the question of the indebtedness of the plaintiff was allowed in Chambers, but the remainder were refused and the application has been adjourned into Court at the request of the plaintiff.

Interrogatories have very often a more useful function in an action than is always appreciated. I think there has been some variation from time to time in the practice of the Court with regard to the facility with which interrogatories have been allowed or have been disallowed. I doubt myself whether interrogatories are administered as often as it is desirable ; and although I should desire to keep interrogatories strictly within the legitimate limits within which they are permissible, the administering of interrogatories seems to me to be, speaking generally, a step which is more often desirable than undesirable and to be encouraged rather than to be discouraged, because they not infrequently bring an action to an end at an earlier stage than otherwise would be the case, to the advantage of all parties concerned. The function of interrogatories was stated by Cotton L.J. in *Attorney-General* v. *Gaskill* (1), where, after referring to the order of the Supreme Court which relates to the matter and dealing with r. 2, he said : "The right to discovery remains the same, that is to say, a party has a right to interrogate with a view to obtaining an admission from his opponent of everything which is material and relevant to the issue raised on the pleadings. It was said in argument that it is not discovery where the plaintiff himself already knows the fact, but that

(1) 20 Ch. D. 519, 528.

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is a mere play on the word 'discovery.' Discovery is not limited to giving the plaintiff a knowledge of that which he does not already know, but includes the getting an admission of anything which he has to prove on any issue which is raised between him and the defendant. To say that the pleadings have raised the issues, and that therefore the interrogatories should not be allowed, is an entire fallacy. The object of the pleadings is to ascertain what the issues are, the object of interrogatories is not to learn what the issues are, but to see whether the party who interrogates cannot obtain an admission from his opponent which will make the burden of proof easier than it otherwise would have been." Lindley L.J. in *Kennedy* v. *Dodson* (1) cites the following passage from Wigram on Discovery, 2nd ed., p. 15: "It is the right, as a general rule, of a plaintiff in equity to exact from the defendant a discovery upon oath as to all matters of fact which, being well pleaded in the bill, are material to the plaintiff's case about to come on for trial, and which the defendant does not by his form of pleading admit." And later he quotes a further passage of the learned author, in which it is said: "In determining whether particular discovery is material or not, the Court will exercise a discretion in refusing to enforce it, where it is remote in its bearings upon the real point in issue, and would be an oppressive inquisition."

That indicates generally, it seems to me, the lines within which, and I conceive them to be fairly broad lines, interrogatories are admissible. The issue in this particular case seems to me to be plain. The plaintiff alleges that the directors of the defendant company never exercised the power conferred on them by art. 27 at all. He says that they affected to exercise it by disapproving the transferee, but that in fact it was no exercise, because they were bound by contract to the trustees of the debenture trust deed in terms which made it impossible for them to exercise any real discretion at all. The defendants' answer is: We admit the contract with the debenture holder trustees, but none

(1) [1895] 1 Ch. 334, 340.

the less the directors acted in pursuance of the article in refusing registration of the transfer. We make no admission, however, as to what branch of the article they affected to act under, and we are not going to tell you anything about that until the moment comes when the matter is tried. That is what in effect the defendants say. It seems to me that on that the issues quite clearly are: Did the directors exercise their power at all, and if they did exercise it, under which branch of the article did they exercise it, and if they affected to exercise it under either branch did they or did they not exercise it bona fide having regard to the evidence in relation to the contract with the trustees for debenture holders? Leaving out of consideration for a moment the argument which has been addressed to me with regard to the discretionary powers of directors, I should have thought myself that it was plain that the plaintiff was entitled to know before the trial as a matter of pleading what the defendants' case was, and that he was entitled to put to the defendants interrogatories for the purpose of ascertaining what admission the defendants were prepared to make in regard to the matters alleged. It seems to me that interrogatories one, two and three are all clearly directed to the issues which I have indicated—namely, what branch of the power do the defendant company allege they acted under? and, if under the one branch of the power, do they say that Colonel Morden was a person of whom they did not approve, and if under the other branch of the power, do they say that the plaintiff was a person indebted to them? and I should have thought prima facie those were all matters in regard to which the plaintiff was fairly entitled upon the issues raised upon the pleadings to interrogate the defendants.

But it is said that when you are dealing with a company and its directors in regard to these matters of registration some wholly different considerations apply, and that you are not entitled to ask the directors anything at all in regard to the exercise by them of their discretion to refuse registration. Let me say, first of all, that I think on the construction of this article that grammatically the expression "without

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assigning any reason" clearly governs both branches of the article; but it seems to me that the reason for exercising the power is a distinct thing from the grounds which give rise to its exercise. If the indebtedness of the transferor is a ground for the exercise of the power, the power may be exercised one way or the other for one or more reasons; and in my opinion the words "without assigning any reason" have reference to the reasons which move the directors in coming to such conclusion as they may see fit to reach, and have not reference to the circumstances in which the power is exercisable. I think therefore on the construction of the article that the defendants are bound to say whether the directors declined to register because they do not approve of the transferee or because the transferor is indebted to the company, but that they are not bound to tell the plaintiff why in those circumstances the directors did not choose to register the transfer. But whether that be the true construction of the article or not, it seems to me that there is a misapprehension in regard to the directors' position in such cases. The cases which have been cited to me are all cases where, on the final hearing of an application or the trial of an action, there has been a judgment to this effect. Prima facie the directors are assumed to act bona fide just as ordinary trustees in exercising powers are assumed to act bona fide. If anybody alleges the contrary the onus is on him to prove it, and if in fact he adduces no evidence at the trial which justifies a conclusion either that there has been no exercise of the discretion or that there has been a mala fide exercise of the discretion, then the mere fact that the directors have refused to give any reason for the exercise of the power, and for the manner in which they have exercised it, throws no suspicion on them or in any sense shifts the onus of proof so as to put upon them the burden of justifying that which they have done. That seems to me to be the result of the cases to which I have been referred. They have nothing whatever to do with the question what in such a case as this the plaintiff is entitled to ask the defendants on an application for discovery; and an application for interrogatories is nothing

more than an application directed to one mode of obtaining discovery. It is I think impossible to say that in cases of this class some special rule applies. As in any other action the plaintiff is I think entitled when once the issue and relevant facts are ascertained to interrogate the defendants in relation to those issues and those facts for the purpose of obtaining discovery in the widest sense by extracting new information or obtaining admissions of matters within the knowledge of the plaintiffs for the purpose of shortening the trial, or possibly indeed of rendering a trial unnecessary, and of so diminishing the expense to the parties. That being my view I am quite satisfied in regard to the first three interrogatories that they were proper to be allowed.

I have felt more hesitation in regard to the fourth interrogatory, but I have come to the conclusion that it is proper to allow this interrogatory in the modified form accepted by the plaintiff. It seems to me that one of the issues is whether or not these directors fettered themselves by entering into a contract inconsistent with their duty under art. 27; and it is a relevant fact directly connected with that issue whether at those meetings at which they decided to refuse registration they had before them the very document in which their inconsistent obligation was contained. For that reason I propose also to allow the fourth interrogatory.

I will therefore make an order allowing all the interrogatories, and the costs of the application will be costs in the action.

Solicitors: *Lewis & Lewis; Ashurst, Morris, Crisp & Co.*

H. C. G.

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BAILEY *v.* BAILEY.

[1925. B. 4980.]

Savings Banks—Post Office Savings Bank—Deposit—Disputes—Arbitration—Jurisdiction of Registrar of Friendly Societies—Savings Banks Act, 1844 (7 & 8 *Vict. c.* 83), *s.* 14—*Post Office Savings Banks Act*, 1861 (24 & 25 *Vict. c.* 14), *s.* 14—*Trustee Savings Bank Act*, 1863 (26 & 27 *Vict. c.* 87), *s.* 48—*Savings Banks (Barrister) Act*, 1876 (39 & 40 *Vict. c.* 52), *s.* 2, *sub-ss.* 1, 2—*Treasury Order, dated December* 12, 1924 (*St. R. & O.*, 1924, *No.* 1502).

By s. 14 of the Savings Banks Act, 1844, "if any dispute shall arise between the trustees and managers of any savings bank and any individual depositor therein, or any executor, administrator, next of kin, or creditor, or assignee of depositor, who may become bankrupt or insolvent, or any person claiming to be such executor, administrator, next of kin, creditor, or assignee, or to be entitled to any money deposited in such savings bank, then and in every such case the matter in dispute shall be referred in writing to the barrister-at-law. . . . . ":—

Held, (1.) that the words "any person claiming . . . . to be entitled to any money deposited in such savings bank" were not limited to persons claiming through a depositor; (2.) that a dispute between a depositor and a person claiming adversely to him was a dispute within the meaning of the section; (3.) that the Registrar of Friendly Societies, to whom, by virtue of s. 2, sub-ss. 1 and 2, of the Savings Bank (Barrister) Act, 1876, and the Treasury Order, dated December 12, 1924, made under the latter sub-section, the jurisdiction formerly possessed by the barrister under s. 14 of the Act of 1844 had been transferred, now has jurisdiction over disputes between rival claimants to a deposit.

Decision of Russell J. reversed.

APPEAL from the decision of Russell J.

The plaintiff, Ethel Maud Bailey, by her statement of claim, alleged that she kept house for her father, Benjamin Charles Bailey, for a number of years, and that he allowed her for her services from 10*s.* to 15*s.* a week. She further alleged that on August 24, 1920, she deposited a sum of 100*l.* which she had saved in the Post Office Savings Bank, and retained the remainder of her savings, to which she continued to add, in a box in her bedroom.

The father died intestate on June 3, 1924, and letters of administration to his estate were granted to his son, the defendant, Bertram Bailey, who claimed that the plaintiff's savings formed part of the father's estate. In consequence

of this claim the plaintiff deposited in the bank further sums on July 22, August 5, August 18, and October 13, 1924, amounting to 300*l.*, which she alleged were also her savings.

In March, 1925, the defendant applied to the Registrar of Friendly Societies under the Savings Bank (Barrister) Act, 1876, to determine who was entitled to the sums so deposited and the interest thereon. The Registrar, as arbitrator, awarded the sum of 304*l.* 19*s.* 2*d.* to the defendant, and this sum was paid out to him by the Controller of the Post Office Savings Bank without the consent of the plaintiff or the production of her deposit book. The Registrar had given notice to the plaintiff of the arbitration, but she, on the advice of a neighbour that nothing could be done without her signature, had neglected to attend.

The plaintiff then commenced the present action against the defendant, asserting that the jurisdiction of the Registrar was confined to the determination of disputes between the Postmaster-General on the one hand and a depositor or a person claiming through or under a depositor on the other, and that as there was no dispute between these parties there was no jurisdiction to make the award, and therefore that the award was not binding on the plaintiff.

On December 21, 1925, it was ordered that that point of law should be set down for argument before the Court before the question of fact in the action was tried.

On February 24, 1926, the point of law was determined by Russell J., who held that there was no dispute within the meaning of s. 14 of the Savings Banks Act, 1844, between the Postmaster-General and any one. The dispute was between two rival claimants, one the depositor, and the other a person claiming dehors the depositor. The highest that could be said in the present case was that there was a dispute between the Postmaster-General and the defendant. The defendant was in this dilemma: that either the Savings Bank (Barrister) Act, 1876, transferred all the powers given by s. 14 of the Act of 1844, thus construing that section, or, if it did not transfer all the powers, then the Registrar had no jurisdiction to decide the dispute. He had been referred

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to *Lewis* v. *Paulton*. (1) If that case was indistinguishable from the present, his Lordship could not follow it, but it might be distinguished on the ground that there both parties claimed through a depositor. He accordingly held that the award was not binding on the plaintiff and that the arbitration was held and the award made without jurisdiction.

The defendant appealed. The appeal was heard on May 4, 1926.

After the decision of Russell J. the attention of the parties was for the first time called to the existence of a Treasury Order, dated December 12, 1924 (2), which is in the following terms: "By virtue of section 2 (2.) of the Savings Bank (Barrister) Act, 1876, the Lords Commissioners of His Majesty's Treasury hereby transfer to and vest in the Registrar as defined by the Friendly Societies Act, 1896, such powers and duties, if any, as were not so transferred and vested by section 2 (1.) of the Savings Bank (Barrister) Act, 1876, relating to any dispute arising between the trustees and managers of any savings bank or (in the case of the Post Office Savings Bank) the Postmaster-General on the one hand and any individual depositor in any such savings bank, or any executor, administrator, next of kin, or creditor, or assignee of any depositor, who may become bankrupt or insolvent, or any person claiming to be such executor, administrator, next of kin, creditor, or assignee, or to be entitled to any money deposited in any such savings bank."

J. Neal for the appellant. The Order of December 12, 1924, the existence of which was not known to either of the parties when the case was heard in the Court below, is conclusive in the appellant's favour. The jurisdiction to arbitrate arises under s. 14 of the Savings Banks Act, 1844, and is conferred on the Registrar by s. 14 of the Post Office Savings Banks Act, 1861, which established the Post Office Savings Bank.

[LORD HANWORTH M.R. referred to s. 2 of the Act of 1861

(1) (1907) 14 Scots L. T. 818.
(2) St. R. & O., 1924, No. 1502, p 1647.

as to the deposit receipts being conclusive evidence in favour of the depositor.]

That section must be read in connection with s. 14.

The Trustee Savings Bank Act, 1863, does not apply to the Post Office (ss. 2 and 68), but in fact the arbitration section in that Act is in the same terms as that in the Act of 1844. The defendant is a person claiming the money within the wording of s. 14 of the Act of 1844. That section was meant to provide a cheap tribunal for the determination of all disputes relating to deposits in savings banks: *Crisp* v. *Bunbury*. (1) The general words of the section should not be cut down. The provision as to proceeding ex parte on notice to the bank means that where the bank is merely in the position of a stakeholder the arbitrator may proceed in its absence, but he cannot, of course, disregard elementary principles of natural justice and must give the real protagonist notice and an opportunity of attending and presenting his case.

There is a provision for determining disputes as to War Stock in equally wide terms in s. 4 of the War Loan (Supplemental Provisions) Act, 1915 (5 & 6 Geo. 5, c. 93).

Lewis v. *Paulton* (2) was well decided, and covers this case.

Henry Johnston for the respondent.

1. The jurisdiction of the Court is not to be ousted except by express words or necessary implication: *Crisp* v. *Bunbury*. (1)

2. The words "any person claiming to be entitled" in s. 14 of the Act of 1844 must be restricted to "persons claiming through the depositor." The words were not in the Savings Bank Act, 1828 (9 Geo. 4, c. 92). They were introduced because there might be some persons claiming through a depositor, e.g., illegitimate children, who were not otherwise within the arbitration section. This view is supported by s. 2, sub-s. 1, of the Savings Bank (Barrister) Act, 1876, which furnishes a legislative interpretation of s. 14 of the

(1) (1832) 8 Bing. 394, 400. (2) 14 Scots L. T. 818.

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Act of 1844: *Rolle* v. *Whyte* (1); Maxwell on the Interpretation of Statutes, 6th ed., p. 64.

The use of general words in a statute does not preclude inquiry into the object of the statute and the mischief intended to be remedied: *Stradling* v. *Morgan* (2), cited by Lord Halsbury in *Cox* v. *Hakes*. (3)

3. There was no dispute within the meaning of s. 14 of the Act of 1844 with the Postmaster-General; or at most there was only a dispute between the Postmaster-General and the defendant. The dispute here is between the plaintiff and the defendant; there is express provision in the section for proceeding ex parte on notice to the bank, but no provision in the Act or elsewhere for bringing a rival claimant before the arbitrator.

[LORD HANWORTH M.R. "Matter in dispute" is wider than "dispute" and could cover a triangular dispute.]

[SARGANT L.J. Would the barrister make an award depriving a depositor of money without notice?]

No doubt he would not, but that does not affect the question of construction of the section.

4. *Lewis* v. *Paulton* (4) was wrongly decided. It is distinguishable from the present case, on the ground that both parties there claimed through a deceased depositor.

5. The Treasury Order is based on an erroneous interpretation of the Act of 1876.

LORD HANWORTH M.R. This appeal must be allowed. It is an appeal from the judgment of Russell J., who determined the case in the absence of certain information which has been placed before us. It is, therefore, not a case in which we are overruling the decision of the learned judge who has come to his decision upon the same materials as are before this Court; it is a case in which we are differing from him because a new Order has been brought to our attention, which escaped attention at the time when the case was before him. It is an Order made in 1924, and there may be excuse

(1) (1868) L. R. 3 Q. B. 286.
(2) (1560) Plowd. 198*b*.
(3) (1890) 15 App. Cas. 506, 517.
(4) 14 Scots L. T. 818.

for those who ought to have found it and brought it to his attention, inasmuch as it is to be found at p. 1647 of the Statutory Rules and Orders for 1924, which deal with very varying matters, extending over some 2000 pages.

The point we have to determine is an interesting one. In the old days there were statutes which regulated the savings banks, which were social institutions of great merit and utility, and started many years ago. The first statute to which our attention was called as regulating them was a statute of 1817 (57 Geo. 3, c. 105), and that was followed by the Savings Bank Act, 1828 (9 Geo. 4, c. 92). Those statutes contemplated the institutions which then existed, run by managers who gave their services and collected small sums—they were sometimes called Penny Banks and the like—from humble depositors, and gave them the opportunity of accumulating their moneys to the great advantage of themselves and those whom they were bound to support.

I need not begin earlier than the Savings Banks Act, 1844, although we are grateful to Mr. Neal for having called our attention to the earlier statutes. By s. 14 of that Act the following provision is made for the settlement of disputes: "Be it enacted that if any dispute shall arise between the trustees and managers of any savings bank and any individual depositor therein, or any executor, administrator, next of kin, or creditor, or assignee of depositor, who may become bankrupt or insolvent, or any person claiming to be such executor, administrator, next of kin, creditor, or assignee, or to be entitled to any money deposited in such savings bank, then and in every such case the matter in dispute shall be referred in writing to the barrister-at-law appointed under the said recited Acts, who shall have power to proceed ex parte on notice in writing to the said trustees or managers left or sent by the said barrister to the office of the said institution," then the award by the barrister is made "binding and conclusive on all parties."

In *Crisp* v. *Bunbury* (1), a case which decided that since the Act of 9 Geo. 4, c. 92, an action does not lie against the

(1) 8 Bing. 394.

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trustees of a savings bank, and that in case of such dispute the only method of proceeding is by arbitration, Tindal C.J. made some valuable observations on the reason why that form of legislation had been entered upon. He said (1): "These institutions were intended to comprehend a very large number of depositors, chiefly from the lower walks of life; many of them contributing very small sums, and claiming very small profits by the addition of interest. On the other hand, the trustees and managers are uncertain in point of number. To allow, therefore, actions at law to be maintainable by each depositor against the trustees, upon the occasion of every dispute with the institution, either as to the amount of the balance due, or the interest claimed by him, would be, in effect, to cause the ruin both of the depositors and the institution, by casting the costs of an action in the Superior Courts at Westminster upon the losing party. No person would fill the gratuitous office of a trustee or a manager, if he was exposed to the hazard of suits at law at once so expensive and so numerous; no depositor would be able to enforce his just rights, if he must sue in the Superior Courts, at the hazard of being defeated with heavy costs if he sued more of the trustees than he might be able to prove liable; or subject to have his suit abated if he sued too few."

It is in that spirit and for that purpose that the Legislature has provided a short and speedy method for the settlement of disputes, and s. 14 not only includes all those persons who are claiming under or in respect of the depositor, but also any person claiming to be entitled to any money deposited in such savings bank. More than that, what is referred to is not merely a dispute, or the dispute which may have arisen, but it is the matter in dispute; the word "matter" to my mind connoting a rather wider term than "a dispute" or "the dispute," and being equivalent to "matters in difference," which have always been held in arbitration to be the widest words. That matter in dispute is referred to a barrister who is to be appointed, and he is to have power to proceed ex parte on notice in writing to the trustees. At first sight it seemed

(1) 8 Bing. 400.

to me curious that power should be given to the barrister to proceed without having both parties before him, but on consideration I am satisfied that the barrister, even if he receives a communication from the institution or the managers of the institution upon whom he has caused the notice in writing to be served that they do not intend to appear, or to take part in the proceedings, is still to have power to proceed in the absence of one of the parties; but it does not prevent the barrister being charged to deal with the matter in dispute as a barrister may be trusted to deal with it—namely, according to the ordinary rules of justice on hearing all parties, and all relevant evidence which may enable him to decide the dispute. It is, however, to my mind quite clear that from and after the passing of s. 14 this process for the settlement of disputes included not merely claims by, through, or under a depositor, but by other persons who claimed to be entitled to any money deposited in a savings bank.

By the Post Office Savings Banks Act, 1861, there was set up the system of Post Office savings banks, and by the Friendly Societies Act, 1875 (38 & 39 Vict. c. 60), a Registrar of Friendly Societies was appointed; and then by the Savings Banks (Barrister) Act, 1876, s. 2, sub-s. 1, there was transferred to the Registrar the power which then existed in the barrister of dealing with disputes. That sub-section, so far as material, provided that: "The powers and duties vested by the Acts relating to savings banks, Post Office savings banks . . . . in the barrister appointed to certify the rules of savings banks shall be transferred and vested as follows: (1.) . . . . the powers and duties relating to any dispute arising between the trustees and managers of any savings bank or (in the case of a Post Office savings bank) the Postmaster-General on the one hand and any depositor or person claiming through or under a depositor on the other hand, shall be transferred to and vested in the Registrar as defined by the Friendly Societies Act, 1875." That sub-section therefore transferred to the Registrar all the powers that had formerly been vested in the barrister relating to claims which were made against the trustees or managers

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of savings banks or the Postmaster-General by a depositor or a person claiming through or under a depositor; but it did not transfer to the Registrar the power of dealing with a claim of any person claiming to be entitled to any money deposited in the savings bank independently of and not through or under the depositor.

I ought perhaps to refer to the War Loan (Supplemental Provisions) Act, 1915, which was passed after the War Loan of that year had been issued, which provided with reference to claims that might be made by small holders, that these disputes should be settled by referring the matter to the Chief Registrar of Friendly Societies. By sub-s. 2 of s. 4 of that Act it was provided that: "On any such reference being made, the Chief Registrar may proceed ex parte on notice in writing sent by post to the Postmaster-General or trustees, and may inspect the register, and may administer oaths to any witnesses appearing before him; and his award on the matter in dispute shall be final and binding on all parties." I refer to that Act as showing that the practice which had been started many years before has been reasserted in quite modern times, and I think on the whole that this does not differ very much from the practice which is established under s. 6 of the Arbitration Act, 1889, which enables one party to proceed to get an award, even though the other party who might have been present is recalcitrant and refused to agree to or to carry out the terms for submission to arbitration.

What happened in this case was this: The plaintiff had made certain savings, and those savings she had in Treasury notes, and invested them in the Post Office Savings Bank. At that time she was living with her father. Her father died on June 3, 1924, and after his death she made considerable further deposits, amounting in the period from July 22 to October 13, 1924, to no less a sum than 300*l*. The defendant is the administrator of the father's estate, and, as such administrator, claims that this sum of 300*l*., and it may be more, deposited in the few months in 1924 after the father's death, forms part of the father's estate. Pursuant to the powers which were said or believed to be vested in the

Registrar under the Act of 1876, the defendant applied to the Registrar to determine the question, who was entitled to these deposits, and after hearing the matter, the Registrar on May 1, 1925, issued an award, the effect of which was that he awarded that a sum of 304*l.* should be paid to the estate which was represented by the defendant, that is to say, that these deposits made between July and October, 1924, with the accumulated interest, did not belong to the plaintiff, but did belong to her father's estate.

The plaintiff admits that the Registrar gave her notice of his intention to proceed, but she apparently took no part in the arbitration, and she has now brought an action to set aside the award made by the Registrar, on the ground that no dispute had arisen between the Postmaster-General and the plaintiff which could be determined or decided in the proceedings instituted at the request of the defendant, the administrator of her father's estate. This action, it is said, is one between the plaintiff and the defendant. The plaintiff affirms that the moneys which she deposited are hers; the defendant says they are not hers, but belong to her father's estate. The plaintiff contends that moneys are in the hands of the Postmaster-General in the savings bank; that as between the plaintiff and the Postmaster-General, or as between the defendant and the Postmaster-General, there is no dispute, and the only dispute lies directly between the two claimants, and therefore the matter in dispute was not one which could be determined by the Registrar under the powers conferred upon him by the Savings Bank (Barrister) Act, 1876.

Russell J. acceded to the plaintiff's view, and made an order setting aside the award, on this ground. The order is in these terms: "This Court doth declare that the award of Registrar of Friendly Societies dated May 1 in the pleadings mentioned was made without jurisdiction, and is not binding on plaintiff." The main reason which induced the learned judge to come to that conclusion was that under the Act of 1876 what had been transferred to the Registrar were only claims which were made through or under a depositor, claims

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which arose between the Postmaster-General on the one hand, and a depositor or person claiming through or under the depositor on the other, and it was said with force by the plaintiff: "I claim that these moneys are my moneys. I do not claim through any other depositor. I claim as a depositor myself," and she said, and the learned judge accepted the view, that the jurisdiction which had hitherto been vested in the barrister under the Act of 1844 had not been transferred to the Registrar. But now our attention has been drawn to a Treasury Order, dated December 12, 1924. Sub-s. 2 of s. 2 of the Act of 1876 provides that: "All powers and duties (other than those above in this section mentioned) shall be transferred to and vested in such persons as the Commissioners of Her Majesty's Treasury (in this Act referred to as the Treasury) from time to time appoint." So that there was still reserved to His Majesty's Treasury the right to appoint and hand over the duties and powers which were not so vested in the Registrar to somebody whom they should appoint from time to time, and by this Order made on December 12, 1924, it is provided: "By virtue of section 2 (2.) of the Savings Bank (Barrister) Act, 1876, the Lords Commissioners of His Majesty's Treasury hereby transfer to and vest in the Registrar as defined by the Friendly Societies Act, 1896, such powers and duties, if any, as were not so transferred or vested by section 2 (1.) of the Savings Bank (Barrister) Act, 1876, relating to any dispute arising between the trustees and managers of any savings bank or (in the case of the Post Office Savings Bank) the Postmaster-General on the one hand and any individual depositor in any such savings bank or any executor, administrator, next of kin, or creditor, or assignee of any depositor, who may become bankrupt or insolvent, or any person claiming to be such executor, administrator, next of kin, creditor, or assignee, or to be entitled to any money deposited in any such savings bank." In other words the Treasury appointed the Registrar to act as a barrister could have acted in respect of a claim by any one entitled to any money deposited in a savings bank, although that claim was not made through or under

a depositor, and was a claim in respect of which the jurisdiction had not under sub-s. 1 of s. 2 of the Act of 1876 been transferred to the Registrar. By this statutory Order, therefore, the Lords Commissioners of the Treasury have made good what was left out of the transfer effected by s. 2, sub-s. 1, of the Act of 1876.

Russell J., as I have said, had not that Order called to his attention; he did not know that by virtue of it the Registrar in effect stands in precisely the same position as the barrister stood before, and that the Registrar is entrusted with jurisdiction not merely in cases in which the matter in dispute arises through or under a depositor, but also where a dispute arises by reason of any person claiming to be entitled to any money deposited in such a savings bank. It appears to me that this statutory Order exactly fills up the void which Russell J. rightly found to have existed, and now cuts away the ground on which his judgment was based. With this further information before us it is, therefore, plain that we must allow the appeal, and say that the award has been made with jurisdiction and must stand.

I will only add this, that after the interpretation which I think must, as I have already indicated, be given to s. 14 of the statute of 1844, and having regard to the position of the Registrar, who stands in the place of the barrister, he may be fully trusted in these matters to deal with them fully according to the justice of the case, and that there is no danger of his proceeding ex parte in the sense that he acts behind the back of some person interested; that phrase is merely to enable him to proceed without the special appearance of the Postmaster-General or the trustees, but he is not entitled, and I am sure he would not wish, to disregard the rights of persons who may have antagonistic claims to the same sum of money.

For these reasons the appeal must be allowed.

WARRINGTON L.J. I am of the same opinion. The plaintiff in this case deposited with the Post Office Savings Bank considerable sums of money; in the year 1920 she

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deposited a sum of 100*l.*, and in three months of the year 1924 she deposited sums amounting altogether to 300*l.* The defendant is the administrator of the deceased father of himself and the plaintiff, and as such he claimed that at all events the 300*l.* deposited by the plaintiff after the death of their father formed part of the father's estate. He applied to the Post Office for payment of the sums so deposited, and his demand was refused. Ultimately the matter was referred to the Registrar of Friendly Societies appointed under the Friendly Societies Act of 1875, who made an award in favour of the claimant, and ordered that something over the 300*l.* part of the total deposited—I suppose the 300*l.* with interest—should be paid out to the father's administrator, the claimant. The plaintiff has brought this action, alleging that the award of the Registrar of Friendly Societies was made without jurisdiction and was therefore void, and the question so raised has, by an order made in chambers, been directed to be heard as a question of law preliminary to the trial of the action. That question of law has been decided by Russell J. in favour of the plaintiff, and hence this appeal.

The question turns upon the true interpretation of a section of two Acts of Parliament. One is a section of the Savings Banks Act of 1844, and the other is a section of the Savings Bank (Barrister) Act of 1876. The Act of 1844 was an Act passed for regulating savings banks as they existed at that time, long before the idea of constituting the Post Office Savings Bank had occurred to anybody. That Act contained in s. 14 the following provision. [His Lordship read the section and continued :] The plaintiff's contention on the construction of that section is that it does not confer jurisdiction on the barrister to determine a question between a depositor and what I may call an outsider, or rather between the savings bank and a depositor in a three-cornered dispute ; where the question really in dispute is between the depositor and the outsider then the barrister has no jurisdiction to determine it. The words on which the whole question turns were inserted for the first time in this Act. There had been previous Acts giving jurisdiction to determine such questions

relating to savings banks, but they did not contain the words on which I have placed some emphasis, a dispute between the managers and "any person claiming . . . . to be entitled to any money deposited in such savings bank."

With all respect to the argument which has been addressed to us I cannot see how we can say that we are entitled to give some limited interpretation to those words. It seems to me that they were inserted for the express purpose of enabling a dispute as to the title to the deposit to be determined in a cheap and speedy manner just as other disputes relating to savings bank deposits were to be determined. The words are express, and the only contention that can be addressed to the Court in reference to them is that it is possible to give them a limited interpretation, because the Savings Bank Act, 1844, in which the provision is contained, does provide in certain cases for the payment of the deposit on the death of a depositor to persons who might not strictly be entitled as executors or administrators or creditors and so on; but, in my opinion, any such consideration as that is not strong enough to enable us to say that it does not extend to claims made by persons outside the ambit of the depositor and persons claiming under him. The words are quite wide.

Then it is said the Act cannot have been intended to give such extensive jurisdiction, because it contains a curious provision giving the barrister power to proceed ex parte on notice in writing to the officers of the bank only. I think that is quite intelligible. It seems to me that what it means is this, that the barrister who has to proceed to determine judicially the question referred to him may go on to determine that question if he gives notice to the bank whether the bank is there or not, and for this reason, that in a great many of these disputes the bank would know nothing about the matter. It does not matter to the savings bank whether it pays to A. or B., and therefore if the presence of the bank and the determination of the question before the barrister was essential, it might be impossible to get the question determined, and, therefore, power is given to the Registrar or o the barrister, as it was in that case, to proceed ex parte in

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the absence of the bank, but he is to proceed to the determination, and the barrister being a judicial officer can only properly proceed to the determination, of the question referred to him, in the presence, or in the absence satisfactorily explained, of the several parties who are concerned, and I think the arm of the Court is quite long enough to prevent any award being made which was contrary to the ordinary principles of justice as understood in the law of England. It seems to me, therefore, on the construction of that section that a claim by an outsider, if I may so call him, is within the section.

Then it is said that here there is no dispute between the bank and the outsider. With all respect to the learned judge who has expressed a contrary opinion, I cannot conceive where a dispute arises unless this be a dispute. The claimant calls upon the bank to transfer the money to him and the bank says: "No, I will not transfer the money to you. I will help you to some extent, because I will put a stop on it, but I will not transfer the money to you, because I may afterwards have to pay it to the depositor." The claimant repeats: "I am entitled to that money and ought to have it transferred to me." It seems to me there is plainly a dispute there, a dispute between the bank and the claimant.

If we had to deal with a barrister acting simply under s. 14 of the Act of 1844 and nothing more, then I should be of opinion that he would have jurisdiction to determine the dispute in question; but the matter unfortunately does not quite rest there, because at the time the Act of 1844 was passed the Post Office Savings Bank did not then exist. It was constituted by the Post Office Savings Banks Act, 1861, by s. 14 of which all the provisions of the Acts then in force relating to savings banks as to matters for which no other provision was made by that Act, were made applicable to that Act so far as the same were not repugnant thereto. The provisions, therefore, of s. 14 of the Act of 1844, which I have been discussing, became applicable to the Post Office and to the depositors in the Post Office, and so forth. From the passing of that Act the barrister referred to in the Act

of 1844 would have power to determine claims relating to deposits in the Post Office Savings Bank. That power was preserved by s. 48 of the Trustee Savings Bank Act, 1863 (26 & 27 Vict. c. 87), which repealed some of the previous Acts, including the Act of 1844, but with an express saving of those Acts so far as they were applicable to the Post Office. So that notwithstanding the passing of that Act the Post Office still remained subject to the provisions of s. 14 of the Act of 1844. That state of things continued down to the Savings Banks (Barrister) Act of 1876, under which the present award was made. That Act contained this provision in s. 2: "The powers and duties vested by the Acts relating to savings banks, Post Office savings banks, and the Commissioners for the Reduction of the National Debt, in the barrister appointed to certify the rules of savings banks shall be transferred and vested as follows," and then in sub-s. 1: "The power of certifying rules, and alterations or amendments of rules of savings banks, and the powers and duties relating to any dispute arising between the trustees and managers of any savings bank or (in the case of a Post Office savings bank) the Postmaster-General on the one hand and any depositor or person claiming through or under a depositor on the other hand, shall be transferred to and vested in the Registrar as defined by the Friendly Societies Act, 1875." It was under that sub-section that the Registrar purported to make the award now in question. When the matter was brought before Russell J. it was thought by both sides that the question depended upon that Act and that Act alone, and he held, and if I may say so, on the materials before him, rightly held, that the power of determining, assuming it existed before, any dispute between the Savings Bank and a third person, or outsider not a depositor, was not transferred by that provision, which only transferred disputes arising between the Post Office and a depositor or person claiming through or under the depositor, and on that I think rightly he held that the jurisdiction to determine this dispute was not transferred. But it has since been discovered, though neither the learned judge nor counsel were aware of the fact

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at that time, that in the year 1924 a Treasury Order was made under the power conferred by s. 2, sub-s. 2, of the Act of 1876. That sub-section provides that: "All powers and duties (other than those above in this section mentioned) shall be transferred to and vested in such persons as the Commissioners of Her Majesty's Treasury . . . . from time to time appoint." By that Order the Treasury transferred to and vested in the Registrar, as defined by the Friendly Societies Act, 1896, "such powers and duties, if any, as were not so transferred and vested by section 2 (1.) of the Savings Bank (Barrister) Act, 1876, relating to any dispute arising between the trustees and managers of any savings bank or (in the case of the Post Office Savings Bank) the Postmaster-General on the one hand and any individual depositor in any such savings bank, or any executor, administrator, next of kin, or creditor, or assignee of any depositor, who may become bankrupt or insolvent, or any person claiming to be such executor, administrator, next of kin, creditor, or assignee, or to be entitled to any money deposited in any such savings bank."

In my opinion, that Order has removed the objection which prevailed before Russell J., and that being so, and having regard to the fact that I am satisfied, as I have said, that claims such as this could have been referred to the barrister, and, therefore, can now be referred to the Registrar, I think the judgment of Russell J. was wrong, and must be set aside, and a declaration made that the award was made with jurisdiction and is valid and binding on the parties.

SARGANT L.J. I am of the same opinion, but I fully recognize that the decision that was come to by Russell J. was a decision come to upon materials which differed in a most important respect from the materials that are now before us. Russell J. had to determine the matter on the footing of the transfer of jurisdiction given to the Registrar by s. 2, sub-s. 1, of the Savings Bank (Barrister) Act, 1876; we have to determine the matter upon the footing of the transfer of jurisdiction given to the Registrar not only by sub-s. 1 of that Act, but by the Order of 1924 operating on

sub-s. 2 of s. 2 of the Act. And therefore, while Russell J. had to construe the language of sub-s. 1 of s. 2 of the Act of 1876 only, we have to construe the wider language of s. 14 of the Act of 1844. If the matter had come before us in the shape in which it came before Russell J. I should have seen no reason for altering or varying his order, but as it is, and applying my mind to a question different from that which was before him, I feel satisfied that the words of s. 14 of the Act of 1844 are sufficiently wide to enable the Registrar, who has now been substituted for the barrister, to decide a claim not only as between the bank and a depositor, or person claiming through or under the depositor, but also as between the bank and the depositor and persons claiming by title adverse to the depositor. In my judgment the words "or to be entitled to any money deposited in such savings bank" in s. 14 of the Act of 1844 are sufficiently wide to effect that result, and I therefore agree that the appeal should be allowed.

Appeal allowed.

Solicitors for appellant: *Jackson & Jackson, for J. W. Fenoughty, Rotherham.*

Solicitors for respondent: *Andrew, Wood, Purves & Sutton, for J. Halmshaw, Barnsley.*

W. I. C.

C. A.
1926
April 23, 26, 27; May 17.

PUBLIC TRUSTEE *v.* ELDER.

[1924. P. 1390.]

Partnership—Account—Parties—Enemy Firm with English Partner—Liquidation—Assignment—Custodian—Emergency Legislation—Trading with the Enemy (Amendment) Acts—Treaty of Peace Order, 1919, *art.* 297—*Partnership Act*, 1890 (53 & 54 *Vict. c.* 39), *ss.* 31, *sub-s.* 2; 38.

At the outbreak of war on August 4, 1914, three German subjects were carrying on, in co-partnership with F., their English partner, the business of merchants in London under the style of Arnold Otto Meyer & Co. Under the partnership articles F. was the managing partner in London, and on the dissolution by the declaration of war he carried on the business and collected the assets with the view of liquidation. No accounts had been taken between the partners since December 31, 1913. F. died in 1920, and the defendant was his legal personal representative. By an order of the Board of Trade dated April 1, 1924, it was ordered that all the property, rights, and interests of the three German partners in the assets of the firm in respect of any claim against the English partner, or his estate, should vest in the plaintiff, who should take all necessary proceedings to collect what might be due to the German partners. In an action by the plaintiff as custodian of enemy property, with the object of winding up the partnership, he claimed an account against the defendant of all dealings between the German partners and the English partner, including all dealings with the partnership assets since the dissolution, payment of what should be found due, and an inquiry of what the partnership consisted. The German partners were not added as plaintiffs in the action. Eve J. held that in the absence of the German partners as parties to the action no such relief as was asked could be granted, and the action failed.

On appeal:—

Held, that it was necessary for the proper liquidation of the firm's affairs and the ascertainment of the amounts divisible or payable by the partners inter se, that each partner should personally account to the others for his receipts and transactions in the winding up; that reciprocity of personal obligation for that purpose was as complete as it was under ss. 28 and 29 of the Partnership Act, 1890, during the continuance of the partnership; that, that being so, the assignee of the share of a partner in a dissolved partnership, when requiring an account as from the date of dissolution, could not substitute for the reciprocal personal obligation of the assigning partner to account to the other partners a mere personal obligation of the assignee himself to account, while still requiring the other partners to discharge as towards him their personal obligations:—

Held, therefore, that the German partners were necessary parties to the action, and accordingly that the action was defective for want of parties and must be dismissed.

Decision of Eve J., ante, p. 266, affirmed.

APPEAL from the decision of Eve J. (1)

The facts are fully stated in the report of the case in the Court below.

The following statement of facts, taken from the written judgment of the Master of the Rolls, is sufficient for the purposes of the present report :—

" Under an agreement dated August 21, 1911, Eduard Lorenz-Meyer, Adolf Laspe and Franz Heinrich Wittheofft, who were German nationals, and were then carrying on business in London under the firm name of Arnold Otto Meyer & Co., agreed with Augustus George Faber to take him into partnership. The four partners were to take and bear 25 per cent. of the profits or losses, and Faber was to take up 1000*l.* annually against his share, with adjustments to be made as soon as the profit or loss account had been determined after the close of the year's trading. The last such account was made up to December 31, 1913. The agreement was subject to English law. Upon the outbreak of war with Germany on August 4, 1914, the partnership became dissolved.

" On November 3, 1914, Faber was licensed to wind up the affairs of the partnership in England. On June 26, 1918, an accountant, named Bostock, was appointed by the Board of Trade to examine the books, and on November 22, 1918, an order was made by the Board of Trade that the business should be wound up by a controller.

" In 1920 Bostock ascertained that a balance was due from Faber arising out of the assets which the latter had collected under his licence. On October 2, 1920, Faber died, having appointed the defendant, Elder, his sole executor, and on December 4, 1920, probate of the will was granted to the defendant, who is sued as Faber's legal personal representative.

" In 1920 an action was brought in the name of the firm, *Meyer & Co.* v. *Faber* (1920, M. 1039), to recover the sum alleged to be due to the firm from Faber. That action was held not to be maintainable by the Court of Appeal (2), on

(1) Ante, p. 266. (2) [1923] 2 Ch. 421.

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the ground that an action could not be brought in the firm's name against a partner in the firm, inasmuch as the firm's name being only a collective description of all the partners, the partner against whom it was brought would be both a plaintiff and defendant.

"That judgment was delivered on May 17, 1923. On April 1, 1924, a vesting order was made by the Board of Trade. That order recited the Treaty of Peace signed at Versailles on June 28, 1919, the Treaty of Peace Act, 1919, and the Order in Council, dated August 18, 1919, made thereunder by which the force of law was given to the parts of the Treaty therein specified.

"The vesting order vested 'all the property, rights, and interests of the German partners in the firm of Arnold Otto Meyer & Co. of whatever kind or description in the assets of the firm, or the proceeds thereof, or in respect of any claim against the said Augustus George Faber, or his estate, or against any other person' in the plaintiff in the present action, who was further charged to take all such legal or other proceedings as might be necessary to get in and collect whatever moneys may be due in respect of such property, rights, and interests of the German nationals.

"Accordingly the plaintiff on June 4, 1924, commenced the present action against Faber's executor and claimed: '(1.) An account of all dealings and transactions between Eduard Lorenz Lorenz-Meyer Adolf Laspe and Franz Heinrich Wittheofft and Augustus George Faber as co-partners in the business of merchants and agents carried on by them under the style of "Arnold Otto Meyer & Company" in the City of London, including in such account all dealings with the partnership assets since the dissolution of the said partnership. (2.) An inquiry of what the credits property and effects now belonging to the said partnership consist. (3.) Payment by the defendant to the plaintiff of what on the taking of the said account shall be found to have been owing from the English partner to the German partners,' and other consequential relief."

On the documents the plaintiff was the Public Trustee as

custodian for England and Wales under the Trading with the Enemy (Amendment) Act, 1914; but since the commencement of the action the property had been transferred to the Administrator of German Property, who by the direction of the Court of Appeal was ordered to be joined as a co-plaintiff.

Eve J. held that in the absence of the German partners as parties to the action no such relief as was asked could be granted, and the action therefore failed.

The plaintiff appealed.

Gover K.C. and *Vaisey K.C.* for the appellant. The German partners have nothing whatever to do with the accounts; the plaintiff is the only person concerned with them. It is not contended on behalf of the appellant that the vesting order has any greater effect than an ordinary assignment. The form of this action is based upon the observations of Lord Sterndale M.R. in *Meyer & Co.* v. *Faber* (*No.* 2) (1), and it was on the footing of the suggestion there made and of the observations in *Hugh Stevenson & Sons, Ld.* v. *Aktiengesellschaft für Cartonnagen-Industrie* (2) that the order vesting the property, rights, and interests of the three German partners in the plaintiff was obtained on April 1, 1924. The plaintiff is by virtue of the vesting order a statutory assignee of the shares of the German partners, and he is seeking to have those shares ascertained. Under art. 297 (*b*) and (*d*) of the Treaty of Peace and clauses 4, 9 and 14 of the Annex, the German partners are no longer interested in the accounts to be taken, and consequently this action is not defective for want of parties.

Alternatively the plaintiff is entitled to an account as from the date of dissolution under s. 31, sub-s. 2, of the Partnership Act, 1890: *Watts* v. *Driscoll* (3); Lindley on Partnership, 9th ed., pp. 448, 449, 976, and he is willing to submit to pay what, if anything, may be found due from him. It is the statutory right of the assignee to have such an account: *Bonnin* v. *Neame.* (4)

(1) [1923] 2 Ch. 421, 436.
(2) [1916] 1 K. B. 763; [1917] 1 K. B. 842; [1918] A. C. 239.
(3) [1901] 1 Ch. 294.
(4) [1910] 1 Ch. 732.

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[SARGANT L.J. referred to *Bergmann* v. *Macmillan* (1) and to *Russian Commercial and Industrial Bank* v. *British Bank for Foreign Trade*. (2)

LORD HANWORTH M.R. referred to *Tolhurst* v. *Associated Portland Cement Manufacturers* (1900), *Ld.* (3)]

As to the proper form of order for accounts under s. 31 of the Partnership Act, 1890, see orders made in *Watts* v. *Driscoll* (4) and *Yates* v. *Finn* (5); in Seton on Judgments and Orders, 7th ed., pp. 2102, 2114. The only point the judge decided against the appellant was that he was bound to join the German partners as parties. It is submitted that he is not and never was bound to do so. The appellant is now, however, willing to submit to be bound by the accounts and to pay any adverse balance that may be found against him. That submission was never suggested to him in the Court below.

W. A. Greene K.C. and *Heckscher* for the respondent. The action is misconceived as regards the nature of the relief claimed and is defective as to parties. The question of parties is vital to the action. In *Meyer & Co.* v. *Faber* (*No.* 2) (6) Younger L.J. said that it was "impossible to assert that there cannot be, nor does the plaintiff deny that on the taking of the partnership accounts there may be, as between the defendant and his late partners, a balance, even a substantial balance, due to the defendant or his estate." As to this the respondent is entirely in the dark. All he wants is, as executor, to have the estate cleared up. The German partners must, therefore, be parties to the action either as co-plaintiffs or co-defendants. If they are made co-defendants the plaintiff must undertake to pay any adverse balance that may be found against them.

A partner is bound to account to his co-partners and to pay anything that may be found due from him on taking such account. He cannot assign his obligations. A partner cannot have another person foisted upon him as an accounting party under an assignment by his co-partner.

(1) (1881) 17 Ch. D. 423.
(2) [1921] 2 A. C. 438.
(3) [1902] 2 K. B. 660.
(4) [1901] 1 Ch. 294.
(5) Unreported.
(6) [1923] 2 Ch. 421, 443.

Here the vesting order put the plaintiff in the shoes of the German partners for all purposes. It vested in him not merely the rights but the obligations of the partners. In an action by an assignee of a share of a partner for an account the assignor must be present in order to fulfil his obligations to the other partners. A partner by assigning his share in the partnership cannot expose his co-partners to a new kind of action or compel them to accept as an accounting party a person with whom they have not contracted. A partner is entitled to look to the solvency of the partner with whom he has contracted. A partner cannot by assigning his share put the continuing partners in a worse position than they were before. To hold otherwise would enable a partner by assigning his share to alter the rights of his co-partners against their will. The form of accounts in *Watts* v. *Driscoll* (1) given in Seton on Judgments and Orders, 7th ed., p. 2102, was one of an order made in the case of a mortgage by a partner of his share. An assignee cannot obtain an order to account without submitting to account and to pay anything which may be found to be due from him on taking the account: *Bergmann* v. *Macmillan.* (2) In *Tolhurst* v. *Associated Portland Cement Manufacturers* (1900), *Ld.* (3), Collins M.R. said: "It is, I think, quite clear that neither at law nor in equity could the burden of a contract be shifted off the shoulders of a contractor on to those of another without the consent of the contractee." That has always been accepted as defining the position, and that position has not been altered by anything in the Partnership Act, 1890, or in the Peace Treaty. The respondent is therefore entitled to have an account from the German partners.

In the Court below it was contended that what were vested in the plaintiff by the order were rights and not obligations, and that he would therefore be under no liability in the case of an adverse balance. The plaintiff is endeavouring to take away from the defendant a right to which he is

(1) [1901] 1 Ch. 294. (2) 17 Ch. D. 423.
(3) [1902] 2 K. B. 660, 668.

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entitled by the partnership contract. That right is not affected either by the Trading with the Enemy Acts or by the Peace Treaty. Neither those Acts nor the Peace Treaty gives a new kind of action or deprives a British national of any of his rights: *Meyer & Co.* v. *Faber* (*No.* 2). (1)

Sect. 31 of the Partnership Act, 1890, which deals with the rights of an assignee of a share in a partnership does not apply to the case where the assignment has been made after dissolution. Sub-s. 2 of that section applies only where the assignment is made before the dissolution of the partnership: *Watts* v. *Driscoll*. (2) The section leaves all other partnership rules undisturbed: see s. 46. If therefore the rule in equity is that in taking partnership accounts all the partners must be present, s. 31 does not give a new right which would violate that rule.

The question of parties to partnership actions is dealt with in Lindley on Partnership, 9th ed., p. 562.

[WARRINGTON L.J. referred to *Hills* v. *Nash*. (3)]

Vaisey K.C. in reply.

Cur. adv. vult.

May 17. The following written judgments were delivered:—

LORD HANWORTH M.R. This is an appeal by the plaintiff from a decision of Eve J. given on December 10, 1925, whereby he dismissed the action with costs. [His Lordship stated the facts as above set out and continued:] The defendant (inter alia) admits in his defence that it was a fact that Faber received, under the authority vested in him, certain sums for the account of the partnership which were and are assets of the business, but (see para. 14 of the defence) that it was not competent to the Board of Trade either under the Trading with the Enemy (Amendment) Act, 1916, or under the Treaty of Peace Act, 1919, or the Treaty of Peace Order, 1919, or the Treaty of Peace (Amendment) Order, 1920, to vest in the plaintiff any right of the German partners to claim as against the English partner, or his estate, any such

(1) [1923] 2 Ch. 421, 434, 439, 440, 445, 446.

(2) [1901] 1 Ch. 294.

(3) (1845) 1 Ph. 594.

accounts or inquiries as are claimed in the action on the grounds stated in the same paragraph. The defendant further takes the point that "no account in relation to the partnership can be properly taken in any proceedings to which the German partners are not parties, and that in any proceedings between the German partners and the representatives of the English partner, the latter would be entitled to bring into account as between the English partner and the German partners: (*a*) remuneration for the English partner's services in collecting moneys due to and winding up the affairs of the partnership; (*b*) the English partner's share of profits up to the dissolution of the partnership; (*c*) the English partner's share of commission on the profits of Behn Meyer & Co., Ld., of Singapore; and (*d*) the surplus of the moneys of the partnership collected by the said Geoffrey Bostock over the amount of debts of the said partnership paid by him, and that the representative of the English partner would also be entitled to take objection to any payments by the partnership to Swiss clients and others which he had not agreed to."

I have set out the issues and points relied upon with precision, for the point that the defendant takes applies to all—namely, that in any account the presence of the German partners in the taking of the accounts is essential. One alternative was that an account should be ordered as from the date of the dissolution of the partnership under s. 31, sub-s. 2, of the Partnership Act, 1890. The plaintiff's counsel also before this Court was ready to undertake that, if there was, upon the accounts taken, a balance due to the defendant the plaintiff would undertake a personal responsibility in respect of it. He was reluctant to undertake that the German partners should be joined as plaintiffs, for he claimed that by the terms of the relevant clause in the Treaty of Peace, art. 297 (*b*) and (*d*), and the Annex to it, particularly clauses 4, 9 and 14, the German partners were no longer interested in the accounts to be taken, and that the action was not defective for want of parties.

The defendant relies upon the primary principle of

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partnership law, that a partner is liable to render accounts during the partnership, and in an action to wind up, to his partners, and to pay whatever he may be found liable to pay, and that a partner cannot get rid of this liability by assignment. The plaintiff does not contend that he is in any higher or holds any better position, as the Public Trustee, than any other assignee would do. He has vested in him the rights of the German partners. The defendant contends that this connotes that he has a liability to the defendant as a partner, and that the assignment, whether effected by force of law or otherwise, cannot modify the defendant's rights as a partner. Eve J. has accepted the defendant's argument, and in my judgment he was right.

Fry J. in *Bergmann* v. *Macmillan* (1) stated the law thus: "I do not for one moment say that a person who has obtained an assignment of a share of profits is not entitled to an account of the profits from the person by whom they are payable. But, in my judgment, in order to avoid multiplicity of actions, the account must be taken once for all in the presence of all the persons interested." And see Lindley on Partnership, 9th ed., p. 562. The defendant must not be required to give an account as the only accounting party. He is called upon to do so only at the suit of persons who have corresponding rights and liabilities, of which they cannot divest themselves by assignment: see that same case and *Tolhurst* v. *Associated Portland Cement Manufacturers* (1900), *Ld.* (2) By art. 297 of the Treaty, the liquidation of the property, rights, and interests belonging at the date of the coming into force of the Treaty to German nationals, is to be carried out in accordance with the laws of the Allied or Associated State concerned, and that article, as already pointed out, is incorporated in the Treaty of Peace Order, 1919, and the vesting order is made pursuant to that Order.

The mere undertaking to accept liability does not cure this defect of want of parties: see *Hills* v. *Nash*. (3) As to the alternative claim under s. 31 of the Partnership Act, that

(1) 17 Ch. D. 423, 427. (2) [1902] 2 K. B. 660, 668.
(3) 1 Ph. 594.

does not appear to alter the above principle. It appears to me, though it is not necessary to decide the point, that that section contemplates only an assignment which took place before the dissolution of the partnership; but in any view that section does not appear to give a right to an account without due regard to the rights inter se of all the partners to which I have referred, or to an account other than that which would be taken in ordinary course between partners.

For these reasons the appeal must be dismissed with costs.

WARRINGTON L.J. The plaintiff, the Public Trustee, is the custodian for England and Wales under the Trading with the Enemy Amendment Act, 1914. At the outbreak of war a firm called Arnold Otto Meyer & Co. carried on business in the City of London. Of the four partners three were German nationals and the fourth, whose name was Faber, was an Englishman.

On August 4, 1914, the partnership was dissolved by the outbreak of war. With the licence of the proper authority Mr. Faber realized and got in certain assets and discharged certain liabilities of the firm, and it is alleged that there remained in his hands certain moneys some part of which at all events represented a portion of the shares of the German partners.

Mr. Faber died on October 2, 1920. The defendant is his executor.

By an order dated April 1, 1924, and made under the authority of the Trading with the Enemy Act, 1916, the Treaty of Peace Act, 1919, the Treaty of Peace Order, 1919, and the Treaty of Peace (Amendment) Order, 1920, the Board of Trade ordered, amongst other things, that all property, rights, and interests of the German partners and each of them as former partners and partners in the said firm of whatever kind or description in the assets of the said firm or the proceeds thereof or in respect of any claim against the English partner or his estate or against any other person should vest in the plaintiff.

The plaintiff contends, and, in my opinion, rightly contends,

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that he is an assignee of the shares in the partnership of the German partners within the meaning of s. 31 of the Partnership Act, 1890, and he claims to be entitled to receive the share of the partnership to which the assigning partners are entitled as between themselves and the other partners, and for the purpose of ascertaining that share to an account as from the date of the dissolution.

On June 4, 1924, the plaintiff commenced this action against the defendant as the executor of the English partner, Mr. Faber. By his statement of claim he claims as follows: "(1.) An account of all dealings and transactions between the German partners and the English partner as co-partners in the said business, including in such account all dealings with the partnership assets since the dissolution of the said partnership. (2.) Payment by the defendant to the plaintiff of what on the taking of the said account shall be found to have been or be owing from the English partner or his estate to the German partners or the plaintiff. (3.) An inquiry of what the credits property and effects now belonging to the said partnership consist. (4.) Such further accounts, inquiries and other relief as may be necessary for winding up the affairs of the said partnership and adjusting the rights of the plaintiff and the defendant in relation thereto."

The defendant by his defence, amongst other grounds of defence, submitted that no account in relation to the partnership could properly be taken in any proceedings to which the German partners were not parties.

At the hearing this objection was insisted on, and further the defendant contended that unless the German partners were made co-plaintiffs no order for an account could be properly made even in their presence as defendants, except upon a submission by the plaintiff to pay what, if anything, might be found to be due to the estate of the deceased partner. The plaintiff refused to join the German partners either as plaintiffs or defendants, and also refused to make the submission above referred to. Eve J. accepted the contention of the defendant and dismissed the action. The plaintiff appeals.

In this Court the plaintiff offered to submit to pay whatever, if anything, may be found due to the defendant, but insisted that the action was maintainable in the absence of the German partners. In my opinion the defendant's objection is well founded, and is not merely technical but one of substance.

The relation of partners to each other is a complicated one; it is not one in which a partner is merely entitled to certain rights as against his co partner, he is also under certain correlative obligations, one of which is to account to them in respect of his dealings with the partnership affairs. This obligation is not one which can be affected by an assignment of his share in the partnership. The obligation does not pass to the assignee. This principle is well expressed in the passage from the judgment of Collins M.R. in *Tolhurst* v. *Associated Portland Cement Manufacturers* (1900), *Ld.* (1), referred to by Mr. Greene. It is unnecessary to read the passage, which is of considerable length. It may be and I will assume in this case that the German partners have in effect parted with the entirety of their rights in the assets. This may be so, but they have not parted with and cannot divest themselves of their obligations. If an account is to be taken of the dealings and transactions of the partnership that account involves an accounting by the German partners as well as by their English co-partner. The Partnership Act, s. 31, no doubt gives to the assignee the right to an account for the purpose of ascertaining the share of the assigning partner, but it does not define the nature of that account, except that it is to be from the date of dissolution, but except possibly in a case in which the accounts were finally settled up to the date of the dissolution it is in my opinion impossible to ascertain the share of the assigning partner without taking an account of the dealings and transactions of the partnership generally. It is said that the result might be obtained by the production of evidence of their dealings without directing an account against them. But in my judgment this does not meet the difficulty. The English

(1) [1902] 2 K. B. 660, 668, 669.

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partner is entitled to an order directing his co-partners to account, and if they fail to comply with such an order and thus fulfil the obligation to which I have referred, the English partner would be absolved from his correlative obligation. It would be unjust to compel him to account trusting to his being able, either himself or through the plaintiff, to adduce evidence as to his partners' dealings. This may often be impossible, and in the present case would probably be so. In fact a judgment against one partner alone would be a one-sided judgment, which might expose him to liabilities from which he might be unable to relieve himself.

For these reasons I think the judgment of Eve J. was right, and that as at present constituted the action is not maintainable.

In my opinion the appeal fails and ought to be dismissed with costs.

SARGANT L.J. The respondent here admits that the order of the Board of Trade of April 1, 1924, has had the effect of vesting in the appellant, by way of absolute assignment, the shares of the German partners in the assets of the partnership which was dissolved on August 4, 1914. On the other hand, the appellant does not assert that this order, or the legislation on which it was based, has had any further or other result than to effect such an absolute assignment. The whole difference between the parties is as to the results of an absolute assignment after the dissolution of a partnership of the shares of some of the partners. But for that assignment the shares of the assigning partners would obviously have been ascertainable only in proceedings to which those partners were parties, and in which they would have been under reciprocal personal obligations to the other partners to render full and just accounts. What then is the effect on these obligations of the assignment? Is it to substitute for the personal obligations of the assigning partners to account a corresponding personal obligation of the assignee to account, so that on performing this obligation to the best of his personal ability he can call on the other partner

for the full benefit of his personal accountability? Or is it merely to substitute the assignee as the ultimate recipient of the value of the share, as ultimately ascertained in the same manner as it would have been ascertained apart from the assignment, that is to say, after the assigning partners had themselves performed their reciprocal personal obligations to account? And further, inasmuch as the assigning partners could not in any proceedings have enforced a decree for account against the other partner, except subject to a liability on themselves to make good any balance found due from them, should that prove to be the case, can their assignee be entitled to obtain a decree for an account, except upon the terms of himself undertaking a corresponding liability? The appellant here has been seeking both before Eve J. and in this Court to obtain such a decree against the defendant without either offering to undertake any liability should the results show that the defendant is, as he asserts, in credit, and also without making his assignors parties to the action, and so ensuring that they should personally account. We have to determine whether the appellant's position is sustainable in either respect or both.

The contract of partnership is essentially one involving in the highest degree reciprocity of personal obligation and trust. In the words of James L.J. in *Baird's Case* (1): "Ordinary partnerships are by the law assumed and presumed to be based on the mutual trust and confidence of each partner in the skill, knowledge, and integrity of every other partner." And under ss. 28 and 29 of the Partnership Act, 1890, partners are under mutual personal liability to render true accounts and full information of all things affecting the partnership, and to account for any benefits derived from any transaction concerning the partnership or from any use by any of them of the partnership property name or business connection. And the position and rights of a partner as towards the other partners are recognized by the law as being so personal and individual that, under s. 31, sub-s. 1, of the Partnership Act, 1890, an assignment by a

(1) (1870) L. R. 5 Ch. 725, 733.

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partner of his share in a partnership does not entitle the assignee to interfere in the partnership or to require accounts or to inspect the books, but entitles him solely to receive the share of the profits as ascertained by the partners to which the assigning partners would otherwise be entitled. It would hardly be possible to express more clearly the essential non-assignability in a subsisting partnership of the position and rights of one partner in relation to the other partners.

On the dissolution of a partnership, however, there is no occasion to limit quite so strictly the right of an assignee as regards transactions occurring after the dissolution. And accordingly under sub-s. 2 of s. 31 it is provided that the assignee is not only entitled to receive the share of the partnership assets to which the assigning partner is entitled as between himself and the other partners, but is also entitled for the purpose of ascertaining that share to an account as from the date of dissolution. The result seems to be that down to the date of dissolution the accounts have to be agreed to personally by the partners and the assignee is bound to accept the accounts as so agreed ; and that the sole account the assignee is entitled to have taken in his presence or to question is an account from the date of dissolution.

It has been argued by the respondent here that on its true construction s. 31, sub-s. 2, applies only to an assignment made prior to the dissolution of a partnership and so does not include the assignment in this case ; and there is a good deal to be said for this view as a matter of strict verbal construction. But it is reasonably clear that s. 31, like most of the sections of the Act, was merely declaratory of the existing law ; and further, if its strict terms only cover the effect after dissolution of a previous assignment, it ought, I think, to be applied by analogy to a subsequent assignment, since there is no apparent reason for putting a subsequent assignee in a worse position than a previous assignee, except so far of course as there may have been an intermediate settlement of accounts between all the partners, which is not the case here. Per contra, however, I can see no reason for

placing a subsequent assignee in any better or worse independent position in respect of the requirement of an account than that recognized by sub-s. 1 in the case of a previous assignee.

What then are the rights of the original partners as regards the taking of the accounts on a dissolution? Are their rights still reciprocal, personal rights involving mutual personal trust and confidence? In my judgment, the only possible answer to this question is an affirmative one. The dissolution of the bond between them is as to new enterprises and transactions only. For the winding up of affairs of the partnership the authority of each partner to bind the firm and the other rights and obligations of the partners continue, as expressly recognized and enacted by s. 38 of the Act of 1890. It is accordingly necessary for the proper liquidation of the firm's affairs, and the ascertainment of the amounts divisible amongst or payable by the partners inter se, that each partner should personally account to the others for his receipts and transactions in the winding up. The reciprocity of personal obligation for this purpose is as complete as it was under ss. 28 and 29 during the continuance of the partnership. This being so, can an assignee of the share of a partner in a dissolved partnership, when requiring an account as from the date of dissolution, substitute for the reciprocal personal obligation of the assigning partner to account to the other partners a mere personal obligation of the assignee himself to account, while still requiring the other partners to discharge as towards him their personal obligations? Such a claim in my judgment involves a violation of the fundamental conditions of reciprocity and personal confidence involved in the partnership contract, and it is directly negatived by the reasoning in the unanimous judgment of the Court of Appeal, as delivered by the then Master of the Rolls, in *Tolhurst* v. *Associated Portland Cement Manufacturers* (1900), *Ld.* (1) The question is specially considered in the passage beginning on p. 668 with the words "It is, I think, quite clear" and ending on p. 669 with the

(1) [1902] 2 K. B. 660, 668, 669.

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words "another artist, however eminent." This passage, relevant as it is throughout, is too long to be quoted here in full. But the following two sentences from p. 669 are perhaps specially appropriate: "There is, however, another class of contracts, where there are mutual obligations still to be enforced and where it is impossible to say that the whole consideration has been executed. Contracts of this class cannot be assigned at all in the sense of discharging the original contractee and creating privity or quasi privity with a substituted person."

The argument for the appellant, as I understood it, suggested that the right to an account from the date of dissolution, recognized by s. 31, sub-s. 2, as belonging to an assignee, operated to give him an independent right to require accounts from the non-assigning partners, independently of the fulfilment by the assigning partner of his reciprocal obligation to furnish accounts from the dissolution. Even if this were so, I doubt whether this would be sufficient for the appellant, since, unless accounts had been agreed by the partners down to the date of dissolution, which is obviously not the case here, these accounts at any rate would have to be agreed between the partners, to furnish a starting point from which the accounts as from the date of dissolution would have to run. But I see nothing in s. 31, sub-s. 2, to indicate that the account recognized as the right of the assignee ought to be taken on any other footing than the performance of the reciprocal personal obligations for which the partners have contracted. And, in default of sufficient indications of the kind, it is inadmissible to place a construction on the sub-section which might in many cases, of which the present may be one, prejudicially affect the position of the non-assigning partners.

The normal and most satisfactory method of protecting the rights of the respondent here would have been, that the appellant should have associated with himself as co-plaintiffs the three German partners whose shares have become vested in him. In that case, the defendant could have secured, as a result of a judgment, first the personal responsibility of

these partners to make good any balance found due to the defendant on the taking of the accounts, and secondly the personal obligation of each of these three partners to account to him on oath in return for his like reciprocal obligation. In view, however, of the extreme difficulty, if not practical impossibility, of the appellant procuring the consent of the three German partners to be joined as co-plaintiffs, the defendant is satisfied if the payment to him of any balance found due to him is secured by an undertaking of the plaintiff to that effect, and if the personal obligation of the German partners to furnish reciprocal accounts is secured by their being added as defendants. The first of these requirements, which is obviously reasonable (see such cases as *Bergmann* v. *Macmillan* (1)), though refused before Eve J., has been reluctantly conceded before this Court by the appellant. But the second requirement the appellant has definitely refused both before the learned judge and before us, though there would seem to be no difficulty in adding these three defendants, and in obtaining leave here to serve notice of the writ on them out of the jurisdiction.

The appellant has indeed suggested that the defendant would be sufficiently protected as the action is at present constituted, because, when the judgment for an account came to be worked out, it would be necessary for him to obtain evidence on oath from each of the three German partners as to his receipts and transactions, and in default of such evidence no balance at all could be arrived at either against or in favour of the defendant. But the effect of such a judgment would be that the defendant would be constituted the sole partner directly liable to account, that the plaintiff himself would only be bound to account on information derived from the three German partners, and that these partners would at the most be in the position of witnesses only, and not of accounting parties. It seems to me that the defendant should not be called on to account as a partner and a party to the action, unless at the same time a similar reciprocal obligation to account is cast upon

(1) 17 Ch. D. 423.

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the other partners as parties to the action. For the control exercised by the Court over parties to the action is obviously greater than that exercisable over mere witnesses; and it would be far more difficult to secure complete reciprocity as between all the partners in the furnishing of accounts and the working out of the judgment, if they were not all of them in the position of parties.

In my opinion, the learned judge was quite justified in his view that to give judgment against the defendant in the present state of the record might result in grievous hardship to him. I agree that the appeal should be dismissed with the usual consequences.

Appeal dismissed.

Solicitors for appellant: *Walker, Martineau & Co.*
Solicitors for respondent: *Roney & Co.*

W. I. C.

LAWRENCE J. 1926 *April* 21.

HERBERT'S TRUSTEE *v.* HIGGINS.

[1925. H. 4185.]

Bankruptcy—Reputed Ownership—Bill of Sale—Entry into Possession by Bill of Sale Holder before Receiving Order—Protected Transaction—Notice of available Act of Bankruptcy—Statement of Intention to take Proceedings in Bankruptcy—Specific Description in Schedule of Chattels—Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 38 (*c*); *s.* 45—*Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 4.

The defendant to an action, in which the trustee in bankruptcy claimed that certain farm stock in a bill of sale given to the defendant by the bankrupt (of which the defendant had before the receiving order taken possession) was in the reputed ownership of the bankrupt and formed part of his estate, had been informed of the service on the bankrupt of a bankruptcy notice, and later had been informed by the petitioning creditor that he was going to take bankruptcy proceedings against his debtor:—

Held, that a mere statement of intention to take bankruptcy proceedings amounted at most to a threat to file a petition, and that, falling short of a notice of the actual presentation of a petition, it was not constructive notice of an available act of bankruptcy.

Lucas v. *Dicker* (1880) 5 C. P. D. 150 distinguished.

Held, also, that farm stock described in the schedule to the bill of

sale as: "cows, 19 short-horns and one Jersey cow," were specifically described within the requirements of s. 4 of the Bills of Sale Act (1878) Amendment Act, 1882.

The observations of Cotton L.J. in *Carpenter* v. *Deen* (1889) 23 Q. B. D. 566, 572 applied.

ACTION WITH WITNESSES.

The bankrupt was a farmer living at and carrying on his business at Dove House Farm, Kinsbourne Green, at Harpenden. On October 15, 1924, he executed a bill of sale on the chattels comprised in the schedule thereto in favour of the defendant, James Higgins, to secure the repayment to the defendant of two advances, one a past advance of 200*l.* and the other a present advance of 800*l.*, making together 1000*l.*, which the bankrupt covenanted to repay on February 27, 1925, with interest thereon in the meantime or until payment of the principal sum thereby secured.

The schedule to the bill of sale contained the following: "8 horses, described by name and age, and 2 three year olds (1 colt and 1 filly). Cows: 19 short-horns—1 Jersey. Store cattle: 2 steers—5 heifers. Pigs: 4 large black sows, 1 middle white boar, Pedigree. 30 pigs (crossed as above)," and a number of agricultural implements.

The bill of sale was duly registered.

On April 17, 1925, the bankrupt committed an act of bankruptcy by failing to comply with a bankruptcy notice which was served upon him by one Ackroyd on April 9. On June 15, 1925, Ackroyd presented his petition in bankruptcy. On September 3, 1925, a cause of seizure under the Bills of Sale Act, 1882, having happened through non-payment of the principal money and some interest, the defendant took possession of the farm stock. On September 9, 1925, a receiving order was made, and on October 1 the debtor was adjudicated bankrupt.

The defendant, as the result of a stroke, was so incapacitated, both bodily and mentally, as to necessitate the constant attendance of a male companion, while his brother guided him in his business affairs. Evidence was given at the trial that the defendant, who was on terms of friendship with the bankrupt within a few days of the service of the bankruptcy

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notice upon him, was informed by the bankrupt of that fact, and although the evidence upon the point was conflicting, the Court felt itself bound to accept that fact as proved. It was also proved that, later, on May 25, 1925, the defendant met Mr. Ackroyd at the Conservative Club at Harpenden, where a conversation took place between them, which resulted in Ackroyd making a bet with the defendant, which was accepted by him, that the bankrupt would not pay the defendant the 1000*l.* which he owed him, within a few days after the bet was made. Evidence was also given by Ackroyd and also by an independent witness of the name of Jones (which although contradicted by the defendant and his attendant who had care of him at the club on the occasion of the bet was accepted by the Court) that as a reason for his belief that the defendant would not be paid his money, Ackroyd stated that he was going to take bankruptcy proceedings against his debtor, the bankrupt, a statement which, however, did not appear to make any impression upon the minds of either the defendant or his attendant.

This was an action by the trustee in bankruptcy, in which he sought a declaration that the chattels described in the schedule to the bill of sale formed part of the property of the bankrupt and vested in the plaintiff under s. 38 (*c*) of the Bankruptcy Act, 1914; in the alternative, that the chattels were not so specifically described as to comply with the requirements of s. 4 of the Bills of Sale Act (1878) Amendment Act, 1882, and that, therefore, the bill of sale was void.

As regards the pigs mentioned in the bill of sale no question arose, because they were not seized by the defendant.

E. W. Hansell for the plaintiff. The chattels here in question were at the commencement of the bankruptcy in the order or disposition of Herbert, the grantor of the bill of sale in his trade or business of a farmer by the consent or permission of the defendant, the true owner thereof, under such circumstances that he was the reputed owner thereof; and therefore they are the property of the bankrupt, divisible by the trustee amongst his creditors within s. 38 of the

Bankruptcy Act, 1914. Even in a case where no cause of seizure had arisen before bankruptcy the reputed ownership of the chattels by the bankrupt has been held to have been with the consent of the true owner. The defendant as the true owner of the goods by the bill of sale itself consented to the retention of the possession of them by the grantor, who ought to have taken steps to negative that reputation of ownership: *In re Ginger.* (1) Further, the chattels are not so specifically described in the schedule to the bill of sale as to satisfy s. 4 of the Bills of Sale Act (1878) Amendment Act, 1882, with the result that the bill of sale is void.

Russell Davies for the defendant. First, it is not contended that the implements specified in the schedule were not in the reputed ownership of the bankrupt; but as regards the horses, cows and store cattle it is open to the defendant to rebut that reputation of ownership by proof of a custom of agistment of those animals generally known to the farming trade: *In re Woodward.* (2) Secondly, seizure of the chattels on September 3, under the bill of sale was not invalidated by reason of notice of an available act of bankruptcy at the time of the seizure: s. 45 of the Bankruptcy Act, 1914. The fact that the bankrupt informed the defendant that he had been served with a bankruptcy notice did not amount to notice of an available act of bankruptcy—namely, an act of bankruptcy available for a bankruptcy petition at the date of the presentation of the petition on which the receiving order is made: s. 167 of the Bankruptcy Act, 1914. The statement made by Ackroyd to the defendant on May 25, that he was going to take proceedings, did not involve notice of an available act of bankruptcy. That statement was made in casual conversation, and did not, in the circumstances, bring to the mind of the defendant any intelligent apprehension that the bankrupt had committed an available act of bankruptcy, so that a reasonable man or ordinary man of business would have acted upon the statement: *Lloyd* v. *Banks* (3) (per Lord Cairns). Notice of an intention to

(1) [1897] 2 Q. B. 461. (2) (1886) 54 L. T. 683.
(3) (1868) L. R. 3 Ch. 488, 490.

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commit an act of bankruptcy is not notice of an act of bankruptcy: *In re Wright.* (1) The statement by Ackroyd amounted to no more than an expression of his intention to instruct his solicitor to take proceedings. The seizure of the chattels under the bill of sale which was originally given to secure a debt was a "dealing for valuable consideration" within s. 45 (*d*) of the Bankruptcy Act, 1914, and, therefore, the defendant is entitled to the protection of that section.

It is sufficient if the inventory is such and the chattels are so specifically described therein as would be usual according to the ordinary mode of making an inventory of the chattels at the place where they are situated: *Witt* v. *Banner* (2) (per Lord Esher). In *Carpenter* v. *Deen* (3) it was held that the description "21 milch cows" was not such a specific description of the goods as to satisfy the section. But here the cows are decribed as "shorthorns," which is a sufficiently specific description: *Hickley* v. *Greenwood* (4) and *Jones* v. *Roberts* (5), where the description of the chattels by the grantor of the bill of sale, who owned a small farm in Wales, as "all my farming stock comprising 4 horses, 5 cows" and other animals, which were in each case described by means of their numbers, was held to be sufficiently specific.

Hansell in reply. The description of the store cattle, horses and cows in this case is not so specific as to satisfy the requirements of the section. In the case of farm stock, which is liable to be changed from time to time and replaced by the substitution of others, the description needs to be more specific than is required in the case of furniture in a private house. The 19 shorthorn cows might have been described also by their colour. There are several breeds of shorthorn cows. In *Davies* v. *Jenkins* (6) the description, "Stock: 2 horses, 4 cows," where there was no evidence that at the date of the bill there were any other horses or cows on the premises of the grantor, was held not to be sufficiently specific.

(1) (1876) 3 Ch. D. 70, 78.
(2) (1887) 20 Q. B. D. 114, 118.
(3) 23 Q. B. D. 566.
(4) (1890) 25 Q. B. D. 277.
(5) (1890) 34 Sol. J. 254.
(6) [1900] 1 Q. B. 133.

The respondent has failed to discharge the onus which lay upon him of proving that he had no notice of an available act of bankruptcy. The notice that Ackroyd intended to take bankruptcy proceedings involved the inference that grounds already existed upon which proceedings would be based and imported notice that the debtor had committed an available act of bankruptcy. Notice that a petition in bankruptcy has been presented or that a creditor has taken proceedings involves notice of an available act of bankruptcy. The inference that the goods were in the order and disposition of the bankrupt with the consent of the defendant has not been rebutted. The evidence shows that the defendant knew that a bankruptcy notice had been served, and it is for him to prove that he had no notice of an available act of bankruptcy. He took no steps to assert his title to the goods until after he had that notice: *Rutter* v. *Everett.* (1) Notice that a petition in bankruptcy has been filed is constructive notice of an act of bankruptcy available for adjudication: *Lucas* v. *Dicker* (2); *In re Sedgwick.* (3) Having regard to the state of the defendant's knowledge when he took possession of the goods, that the bankrupt had been served with a bankruptcy notice and that a creditor had wagered that he would not be paid by the bankrupt as he (the creditor) was going to take bankruptcy proceedings, the defendant was fixed with notice of an available act of bankruptcy or, at least, he was put upon inquiry (which he neglected to make) whether an available act of bankruptcy had in fact been committed: *In re Boocock.* (4)

LAWRENCE J. In this action the trustee in bankruptcy of one, Edward Allen Herbert, claims that certain chattels comprised in the schedule to a bill of sale which had been granted by the bankrupt to the defendant on October 15, 1924, formed part of the property of the bankrupt divisible amongst his creditors and, alternatively, that certain of the chattels contained in the schedule are not sufficiently described

(1) [1895] 2 Ch. 872.
(2) 5 C. P. D. 150.
(3) (1892) 9 Mor. 217.
(4) [1916] 1 K. B. 816.

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in accordance with the requirements of s. 4 of the Bills of Sale Act, 1882, and that the bill of sale is void as to such chattels. [His Lordship then briefly stated the relevant facts and proceeded:] The first question is whether the chattels comprised in the bill of sale were at the date of the commencement of the bankruptcy in the possession of the bankrupt in his trade or business with the consent and permission of the defendant, in such circumstances that the bankrupt was the reputed owner of such chattels. There is hardly any dispute upon that point. The bankrupt had all the chattels in his possession in connection with the trade or business of a farmer while he was carrying it on, and I hold as a fact that they were in his order and disposition in his trade of a farmer in such circumstances that he was the reputed owner thereof.

The next question, which is a more difficult one, is, whether the defendant has discharged the onus which lies upon him of proving that he took possession of the chattels without notice of an available act of bankruptcy committed by the bankrupt. The solution of that question depends upon whether the defendant has established that he had no knowledge or notice of any facts which would reasonably lead an ordinary man of business to conclude that an act of bankruptcy had been committed. [His Lordship then examined the evidence which had been given for and against the truth of the allegation that the defendant had been informed of the service upon the bankrupt of a bankruptcy notice, and said that he was content to assume that that allegation had been proved, and then proceeded:] The real turning point of the case is the interview which took place on May 25 of last year at the Conservative Club at Harpenden. On that occasion undoubtedly a bet was made by Ackroyd with the defendant, that the bankrupt would not pay to the defendant the 1000*l.* and interest within the next few days. The defendant appears to have had confidence in the bankrupt up to the last, and was sanguine that he would be paid within the next few days. Ackroyd was equally positive that the defendant would not be paid. Ackroyd's solicitors had been

instructed as early as March to serve the bankruptcy notice and, although there had been pourparlers after the bankruptcy notice had been served and not been complied with, I think it is obvious that Ackroyd, when making the bet, considered it most improbable that he or the defendant would get any money from the bankrupt. Ackroyd alleged that at his interview with the defendant he stated as one of his reasons for believing that the defendant would not be paid was that he (Ackroyd) was taking bankruptcy proceedings against the bankrupt. In my opinion all the witnesses who gave evidence as to what transpired at this interview were honest witnesses, and stated to the best of their recollection and belief what was said thereat. The conclusion I have come to is that Ackroyd did mention that he was taking proceedings in bankruptcy, but that his statement to this effect made no impression on the minds of the defendant and his attendant, and that they have honestly forgotten that it was made. In those circumstances I hold that that statement was made, and that the defendant must bear the consequences of it having been made. The question then arises whether such a statement amounts to notice of an available act of bankruptcy. Mr. Hansell forcibly contended that the statement must be coupled with the previous statement made by the bankrupt to the defendant, that a bankruptcy notice had been served on him. I am willing to assume—though I do so with some hesitation—that the bankrupt was speaking the truth, and that the defendant was mistaken in saying that no statement as to the service of a bankruptcy notice had ever been made to him by the bankrupt. On that assumption it follows that the defendant had notice of the service of the bankruptcy notice, but that fact does not amount to notice of an act of bankruptcy, because it was given at a time when no act of bankruptcy had in fact been committed. At the date of the interview on May 25 no petition had been presented, nor was it then certain that a petition would be presented. What had taken place was that, after the bankrupt's failure to comply with the bankruptcy notice, Ackroyd's solicitors had commenced negotiations

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with the bankrupt for payment of his debt in order to avoid having to proceed to extremes, and it was not until quite the end of May or early in June that those negotiations came to an end and instructions were given to present the petition. Therefore, on May 25, the utmost that he could have meant when he stated that he was taking bankruptcy proceedings was that he contemplated filing a bankruptcy petition.

Now the question whether a statement that a creditor contemplates filing a petition amounts to notice of an available act of bankruptcy, is one which is not covered by any authority to which my attention has been called. The most that seems to have been decided is that notice of the presentation of a petition is notice of an available act of bankruptcy. In *Lucas* v. *Dicker* (1) Lindley J. stated that in so holding he considered that he would not be pressing the doctrine of constructive notice too far. The question in the present case is whether the Court ought to go a step farther and hold that, when a man tells another that he is going to take bankruptcy proceedings or that he is going to file a petition in bankruptcy, that amounts to constructive notice of an available act of bankruptcy. Horridge J. in *In re Boocock* (2) quotes Mellish L.J. in the case of *Ex parte Snowball* (3), where that learned Lord Justice says: "If he is proved to have received a formal notice he is not allowed to escape from the effect of having had notice by saying he had not read it when he ought to have read it, or that he did not believe it when he had read it"; and then he goes on: "We think if he is proved to have known facts which were sufficient to have informed him that an act of bankruptcy had been committed, he cannot be allowed to escape from the effect of having had notice by saying that he did not draw the natural inference from the facts."

Now here the facts of which I have assumed that the defendant had notice, were that Ackroyd had served a bankruptcy notice early in April, and that on May 25 he stated

(1) 5 C. P. D. 150, 155. (2) [1916] 1 K. B. 816, 819.
(3) (1872) L. R. 7 Ch. 534, 549.

that he contemplated taking bankruptcy proceedings. The case is very near the line, but it seems to me that it would be pressing the doctrine of constructive notice too far if I were to hold that a man casually stating to another that he contemplated filing a bankruptcy petition, although he then knew that a bankruptcy notice had been served, amounted to notice of an available act of bankruptcy. It is not a statement of a fact, but is a mere statement of his intention to take some future step, and I think that it falls short of the tests laid down by Mellish L.J. and is not governed by the decision in *Lucas* v. *Dicker*. (1)

On the whole, therefore, I have come to the conclusion that the defendant has discharged the onus which lies upon him of showing that he had no notice of an available act of bankruptcy on September 3.

Now that brings me to the last point, and that is whether the chattels referred to in the statement of claim are specifically described in the bill of sale within the meaning of s. 4 of the Bills of Sale Act, 1882. As regards the pigs no question arises, because they were not seized nor sold by the defendant. The cows are described as "19 short-horns and 1 Jersey cow," and the store cattle are described as "2 steers and 5 heifers."

With regard to the question whether chattels are so specifically described as to comply with the requirements of the Bills of Sale Act, I have been referred to various authorities, and counsel are agreed that the general rule by which I ought in the first instance to be guided is laid down in *Davies* v. *Jenkins* (1), where Channell J. states: "Upon the question whether the description of particular chattels is sufficient, a distinction is to be drawn between those chattels which are customarily changed from time to time and replaced by the substitution of others, and those which are not. Tables and chairs in a private house are not customarily changed in that fashion, at all events not with any degree of frequency, and a very specific description of

(1) 5 C. P. D. 150, 155. (2) [1900] 1 Q. B. 133, 136.

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them is not required. But livestock on a farm must necessarily, in consequence of death or other causes, be replaced with much greater frequency, and require a more specific description. Merely to specify their number is not enough. So, too, chattels forming the stock-in-trade of a shop, such as the pictures in *Witt* v. *Banner* (1), are, in the nature of things, intended to be parted with and replaced with others whenever the opportunity arises. Therefore, in their case the description is especially required to be specific."

Taking that statement as a guide and bearing in mind that the chattels in question consist of stock on a farm, it follows that it is necessary to have a more specific description than if the chattels had consisted of furniture in a house. The case of *Carpenter* v. *Deen* (2) contains observations made by Cotton L.J., which, although obiter, appear to me to be peculiarly apposite here. In that case the description was simply " 21 milch cows," and Cotton L.J., after holding that that was not a sufficient description, and giving his reasons for so holding, proceeded as follows: " I agree that what description may be given and is required must depend upon the nature of the articles; but I see no difficulty whatever in giving some more precise description of these '21 milch cows.' They might have been identified by breed or colour, or they might have been described as either horned or polled; there are various other ways in which they might have been described." That shows to my mind quite clearly that, if in that case the 21 milch cows had been described as short-horn cows or Jersey cows, that would have been sufficient. In the present case, I think, the description of the cows comes exactly within what in Cotton L.J.'s opinion would be a sufficient description, as they are identified by their breed. Therefore, with regard to the cows, I hold that the bill of sale sufficiently describes them. With regard to the store cattle, however, I hold, on the authority of *Carpenter* v. *Deen* (2) and *Davies* v. *Jenkins* (3), that the

(1) 20 Q. B. D. 114. (2) 23 Q. B. D. 566, 573.
(3) [1900] 1 Q. B. 133.

description is insufficient, as there is no identification either by breed, colour or otherwise.

In the result the action fails, except as to the claim to the store cattle.

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Solicitors: *Ronald George Taylor; Neve, Beck, Son & Co.*

H. C. H.

ANCHOR TRUST COMPANY, LIMITED *v.* BELL.

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March 23, 24, 25, 26, 30, 31.

[1925. A. 459.]

Emergency Legislation—Mortgage—Sale without Leave of the Court—Mortgagee in Possession—Courts (Emergency Powers) Act, 1914 (4 & 5 *Geo.* 5, *c.* 78), *s.* 1, *sub-s.* 1 (*b*)—*Purchaser for Value without Notice—Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 21, *sub-s.* 2—*Waiver of Benefit of the Act—Laches.*

The exception from the prohibition against realizing a security mentioned in s. 1, sub-s. 1 (*b*), of the Courts (Emergency Powers) Act, 1914, in favour of "a mortgagee in possession" is limited to a mortgagee lawfully in possession and does not extend to a mortgagee who has wrongfully taken possession in contravention of the express provisions of the Act.

The mortgagor having become bankrupt in 1911, the second mortgagees went into and continued in possession of the mortgaged property until December, 1914, when B., the first mortgagee, without objection on the part of the second mortgagees and without having applied to the Court for leave under the Act of 1914, went into possession, and in March, 1915, under the power conferred upon her by s. 19 of the Conveyancing Act, 1881, appointed a receiver. In 1918, B., holding herself out as mortgagee in possession and again without the leave of the Court, purported to sell the mortgaged property in lots to the defendant purchasers, who completed their respective purchases with notice that their vendor was not in a position to make a good title.

In an action by the second mortgagees for redemption and possession against the legal personal representative of B. (since deceased) and the several purchasers from B.:—

Held, that, in the absence of evidence that the plaintiffs had waived their rights to the benefit of the Act of 1914, B., not having gone into possession until after the commencement of the Act of 1914, and then without the leave of the Court, and not being in possession at the time she purported to exercise her power of sale, had lost her right to exercise it.

Held, also, that s. 21, sub-s. 2, of the Conveyancing Act, 1881, afforded no defence to the action, as the attempted exercise of the power of sale

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in contravention of the Act of 1914 was not within the purview of that section a mere "improper or irregular exercise of the power": and in default of compliance with the requirements of the Act of 1914, the effect of that Act was to abrogate the power.

THIS was an action, with witnesses, in which the plaintiff company (hereinafter called "the plaintiffs"), as second mortgagee of certain leasehold houses, claimed redemption and possession against the defendants—namely, the legal personal representative of Mrs. Bell, deceased (who was the first mortgagee), and the several purchasers from her of the mortgaged property.

By an agreement dated February 9, 1911, and made between Percy Gatton of the one part and the plaintiffs of the other part, Percy Gatton charged six leasehold houses numbered 13, 14, 15, 16, 17 and 18 Chestnut Road, Ashford, in the county of Middlesex, with the payment to the plaintiffs of the principal sum of 1500*l.* with interest, and undertook when required to execute a legal mortgage thereof subject to any mortgage or charge which might then have been created by him.

By an indenture of mortgage dated September 14, 1911, and made between Percy Gatton of the one part and Elizabeth Bell (then Elizabeth Nutter) of the other part, Percy Gatton demised those six houses for the residue of the respective terms of ninety-nine years from September 29, 1905, except the last day of each of those terms, to secure 700*l.* with interest, and declared himself a trustee for the mortgagee of the respective reversions thereby reserved.

On September 19, 1911, the plaintiffs gave notice of their charge under the agreement of February 9, 1911, to Mrs. Bell.

On July 2, 1912, a receiving order in bankruptcy was made against the mortgagor, and a few days afterwards he was adjudicated bankrupt. In March, 1913, the plaintiffs entered into possession of the mortgaged houses by appointing one Martin to collect the rents on their behalf. Mr. Martin accordingly collected and accounted for the rents to the plaintiffs down to the month of December, 1914, when Mrs. Bell asked the plaintiffs through her solicitors to authorize Mr. Martin to account to her for the rents of the mortgaged

houses; and by a letter dated December 21, 1914, the plaintiffs through their solicitors replied that they had no objection to Mrs. Bell appointing Mr. Martin receiver. Accordingly, Mrs. Bell appointed Martin to collect the rents on her behalf, and on March 29, 1915, under the power conferred upon her as mortgagee, by s. 19 of the Conveyancing Act, 1881, she formally appointed Mr. Martin receiver of the mortgaged houses.

In April, 1918, the mortgagor having failed to comply with her notice to pay the principal moneys under the mortgage of September 14, 1911, Mrs. Bell, without having made any application to the Court for leave, put up the mortgaged property for sale in lots, under conditions of sale which stated that each lot was vested in the vendor as mortgagee under a mortgage by way of sub-demise; that the vendor entered into possession of the mortgaged property as mortgagee in or about 1915; and that the concurrence of the mortgagor should not be required. At that sale the defendant H. W. Abbott became the purchaser of No. 13 Chestnut Road, the defendant George H. Burghes became the purchaser of Nos. 14, 16 and 18, James Rayman became the purchaser of No. 15, and the defendant Miss Helen Agnew became the purchaser of No. 17. On March 25, 1918, the defendant Burghes, through his solicitors, Messrs. Wood & Sons, made the following requisition (amongst others): "Will the vendor obtain the consent of the Court under the emergency legislation or how otherwise does she claim freedom to sell?" To that requisition the vendor's solicitors replied: "It is not necessary to obtain the Court's consent, the mortgagor's mortgagees have been in possession ever since 1912 and long before any emergency legislation came into force, the second mortgagees having been in possession prior to the vendor." On March 27, 1918, Messrs. Wood & Sons wrote to the vendor's solicitor stating that they knew nothing of any second mortgage and drew attention to the statement in the conditions of sale that the vendor entered into possession about the year 1915, which by itself would not appear to make her independent of emergency legislation, and asked to

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hear further on the subject. On April 8, 1918, the vendor's solicitor by way of reply sent a statutory declaration made by Mrs. Bell dated April 24, 1918, in which, after a brief reference to the mortgage of September 14, 1911, and the bankruptcy of the mortgagor, she stated that shortly after the date of the bankruptcy down to December, 1914, the rents were collected by an agent on behalf of the plaintiffs, who claimed to be the second mortgagees, and (without disclosing the appointment of Martin as receiver in March, 1915) that since December, 1914, the same agent collected them on the vendor's behalf.

The other purchasers made similar requisitions and received in reply the same statutory declaration by the vendor, and without further inquiry completed their purchases. Mr. Saint, a member of the firm of Messrs. Wedlake, Saint & Co., who acted for the defendant Abbott in his purchase, was called as a witness on his behalf, and said that he did not recollect reading the statutory declaration, having been informed on the telephone by the vendor's solicitor that the vendor had been in possession from a date before August 4, 1914. By deed dated April 25, 1918, after a recital that the mortgagor had not been in possession of the mortgaged property since the year 1912, Mrs. Bell, in consideration of 90*l.* and in exercise of the power vested in her under her mortgage and the Conveyancing Act, 1881, assigned No. 17 Chestnut Road to the defendant Helen Agnew.

By deed dated April 26, 1918, which contained a similar recital, Mrs. Bell, in consideration of 275*l.* and in exercise of the same power, assigned the houses in Chestnut Road numbered 14, 16 and 18 to the defendant Burghes. By deeds dated November 29, 1918, and February 23, 1920, the houses in the same road numbered 15 and 13 were in consideration of the sum of 80*l.* in each case assigned by Mrs. Bell to James Rayman and the defendant Abbott respectively. Early in 1919, James Rayman sold No. 15 Chestnut Road to the defendant Burghes, and by deed dated February 19, 1919, assigned the same to him; and in 1922 the defendant Burghes sold that house to the defendant Taylor, and by deed dated

November 6, 1922, assigned the same to him. On the occasion of the last mentioned purchase Messrs. Wood & Sons, who had previously acted for the defendant Burghes on his purchase from Mrs. Bell, acted on behalf of both the defendants Taylor and Burghes.

William Reginald Wood (who occupied the dual position of solicitor for the freeholders and managing director of the plaintiff company), in July, 1918, for the first time heard of the sales of four out of the six houses which had taken place in the preceding month of April. The solicitors acting for the purchasers in those sales were Messrs. Wood & Sons. Mr. William Reginald Wood (who was in no way connected with the firm of Wood & Sons) in August, 1918, telephoned to Messrs. Wood & Sons telling them that Mrs. Bell had no right to sell the property and that the plaintiffs would not recognize the sales, and he was then told by a representative of Messrs. Wood & Sons to mind his own business. Mr. W. R. Wood was acquainted with Mr. Mathews, a partner in the firm of Messrs. Wood & Sons, who at that time was serving with the forces in the war, and decided that he would wait until he returned to business. Mr. Mathews was demobilized and returned to business at the end of 1919, when Mr. W. R. Wood saw him and told him the whole story, hoping that some arrangement might be come to. As nothing resulted from that interview, Mr. Wood, after waiting until April, 1922, wrote direct to the defendant Burghes, who at that date had acquired five of the houses, informing him definitely that the plaintiffs, entitled as second mortgagees to redeem the mortgaged property so sold by Mrs. Bell, did not recognize the sales purporting to have been made by her as first mortgagee, as she had failed to comply with the requirements of the Courts (Emergency Powers) Act, 1914, and that the plaintiffs intended to redeem the houses from the mortgage of September 14, 1911. In the meantime—namely, in May, 1920—Mr. W. R. Wood, in his capacity as solicitor for the freeholders, got to hear of the sale of No. 13 Chestnut Road to the defendant Abbott, and to safeguard the plaintiffs' position in a letter of May 17, 1920, he warned the defendant

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Abbott that no opinion was expressed as to his title; he did not, however, indicate in what manner the title might be defective, but suggested that the assignment ought to be registered with the freeholder. It was Mr. W. R. Wood's duty, acting for the freeholders, to obtain payment of the ground rent from the person who happened to be in possession. It was immaterial to the freeholder who paid the ground rents, and in addition to the warning in May, 1920, Mr. W. R. Wood in a letter dated September 26, 1921, while insisting on the payment of the ground rent, stated that, as no assignment had been produced for registration, he could not on behalf of the freeholders recognize the defendant Abbott as a tenant. On April 29, 1922, Mr. W. R. Wood wrote to the defendant Abbott informing him that the alleged sale by Mrs. Bell, who was not in possession, was not recognized by the persons entitled and willing to redeem.

On hearing of the sale of No. 15 Chestnut Road to the defendant Taylor, Mr. W. R. Wood on November 17, 1922, wrote to Messrs. Wood & Sons telling them that he thought he ought to write to Mr. Taylor telling him that Mrs. Bell was not in possession and that the persons entitled to redeem did not admit that the defendant Burghes had any title. Messrs. Wood & Sons were indignant that Mr. W. R. Wood should suggest communicating with their clients direct, and protested strongly against any such notice being given by Mr. Wood, who therefore refrained from writing to Mr. Taylor.

On March 12, 1920, Mrs. Bell died, and on April 21, 1920, her husband, the defendant Robert John Bell, took out letters of administration to her estate.

In March, 1923, Mr. W. R. Wood had some correspondence with Messrs. Wood & Sons showing that proceedings by the plaintiffs were in contemplation; and on May 31, 1923, he wrote to them that he was instructed to take proceedings if necessary. From that date onward for a considerable period the parties were corresponding with the view to a settlement of the questions in dispute, which, however, they failed to attain, and ultimately the plaintiffs on February 27, 1925, issued the writ in this action, in which they claimed to

have an account taken of what was due under the mortgage of September 14, 1911, and upon payment to the defendant Robert John Bell as the legal personal representative of Mrs. Bell deceased of what should be found to be due on the taking of that account, to redeem the six leasehold houses and on such redemption to have possession thereof notwithstanding the alleged sales thereof by Mrs. Bell.

The defences raised were first, that Mrs. Bell was in possession in fact at the time she sold the houses, as Martin was collecting the rents on her behalf from December, 1914, to March, 1915, and the appointment by her of a receiver in March, 1915, was nugatory; secondly, that the defendants were purchasers for value without notice of the fact that their vendor was not in a position to exercise her power of sale; thirdly, that even assuming that they had notice, they were justified in assuming waiver by the plaintiff of the benefit of the Act of 1914 and lastly, laches.

The defendant Miss Agnew purchased No. 17 Chestnut Road as the nominee of the defendant Burghes and did not claim any beneficial interest therein (of which facts the plaintiffs were at the commencement of the action unaware), and by her defence disclaimed all interest in the purchased property.

Owen Thompson K.C. and *G. E. Timins* for the plaintiff company. The plaintiff company is entitled to redeem, notwithstanding the sales by the mortgagee to the defendants. The mortgagee had no power to exercise her power of sale, since she made no application to the Court for leave to exercise it. She was not "a mortgagee in possession" within the exception mentioned in clause (*b*) of s. 1, sub-s. 1, of the Courts (Emergency Powers) Act, 1914 (1), which terminated

(1) Courts (Emergency Powers) Act, 1914, s. 1, sub-s. 1: "From and after the passing of this Act no person shall—(*b*) levy any distress, take, resume, or enter into possession of any property, exercise any right of re-entry, foreclose, realise any security (except by way of sale by a mortgagee in possession) . . . . except after such application to such court and such notice as may be provided for by rules or directions under this Act."

Courts (Emergency Powers) (No. 2) Act, 1916, s. 1, sub-s. 1: "In sub-section 1 of section one of the Courts (Emergency Powers) Act, 1914—

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on August 31, 1922. She was not in possession at the commencement of that Act, August 31, 1914, nor was she in possession at the time when she sold.

Jenkins K.C. and *H. H. King* for the defendants Burghes, Agnew and Taylor. The defendant Burghes was told on the occasion of his purchase that the vendor entered into possession in or about 1915 and had been in possession ever since. He had no notice of the appointment of a receiver by her, and Mrs. Bell purported to sell as a mortgagee in possession. He was entitled to believe and act, as he did, upon that statement of his vendor. The requirements of the Act of 1914 were capable of being waived: *In re Sandow.* (1) The plaintiffs assented to Mrs. Bell going into possession; the letter of December 21, 1914, was evidence of waiver by them (within the meaning of that word as explained by Bowen L.J. in *Selwyn* v. *Garfit* (2)) of a compliance by Mrs. Bell with the requirements of the Act of 1914, that she should apply to the Court for leave: *In re Thompson and Holt.* (3) A sale by a mortgagee in possession is not prohibited, being made an exception from s. 1, sub-s. 1 (*b*). The effect of the prohibition against the power of sale being exercised in the absence of an application to the Court for leave was not to destroy the power; the purchaser's remedy was in damages. At most, the power was "improperly or irregularly" exercised, and the purchaser was protected by s. 21, sub-s. 2, of the Conveyancing Act, 1881. Mrs. Bell having gone into possession in fact was not entitled to appoint a receiver: *In re Prytherch.* (4) Further, there have been laches on the part of the plaintiffs. The plaintiffs' solicitor, knowing that the mortgaged property had been sold, wrote letters on behalf of the landlord in which he said nothing about the plaintiffs' second

(*a*) "the expression 'enter into possession' shall include the appointment of a receiver of mortgaged property."

(*c*) "the expression 'a mortgagee in possession' shall include a mortgagee who before the passing of the principal Act appointed a receiver who is still in possession or receipt of the rents and profits of the mortgaged property. . . . . "

(1) [1916] W. N. 262.

(2) (1888) 38 Ch. D. 273, 284.

(3) (1890) 44 Ch. D. 492.

(4) (1889) 42 Ch. D. 590.

mortgage and must be taken to have acquiesced in the sales : *Lindsay Petroleum Co.* v. *Hurd.* (1) In *Nutt* v. *Easton* (2) the Court refused to set aside a sale by a mortgagee to his own solicitor acting for him in the matter of the sale at the suit of the mortgagor who had stood by for ten years with knowledge of the facts and of his rights.

As regards the defendant Taylor ; he knew nothing about the vendor's title, but left the matter in the hands of his solicitors, Messrs. Wood & Sons, and the knowledge which they acquired when they acted for his vendor, Burghes, on his purchase from Mrs. Bell cannot be imputed to Taylor.

As regards the defendant Miss Helen Agnew, she ought in the circumstances to be dismissed from the action.

E. P. Hewitt K.C. and *J. M. Paterson* for the defendant Abbott. Although the Emergency Powers Act of 1914 may cover the case of a second mortgagee, its primary object was to protect mortgagors. The second mortgagees in the present case did not formulate a complaint that the sales had been made without compliance with the provisions of the Emergency Powers Act, until several years after the sales had been completed. The first mortgagee was in possession in fact at the time of sale, the purported appointment of a receiver after entering into possession being ineffectual. Being in possession the power of sale could be exercised under the terms of the Act. It is immaterial for this purpose that the entry was unauthorized. The Act prohibits entry into possession without leave, but it does not say that such an entry shall not have the effect of giving the party legal possession. The Act resembles in this respect the statute of Richard II., which prohibits forcible entry but does not say that such an entry shall be ineffectual. An owner who enters in breach of this statute nevertheless obtains the benefit of legal possession : *Hemmings* v. *Stoke Poges Golf Club.* (3)

Further, Mr. Abbott's solicitor was informed on the telephone by the vendor's solicitor that the first mortgagee had been in possession from a date prior to August, 1914. He relied

(1) (1874) L. R. 5 P. C. 221, 239, 240. (2) [1899] 1 Ch. 873.
(3) [1920] 1 K. B. 720, 732, 733.

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on this assurance and on similar statements in the correspondence and did not read the statutory declaration; he is entitled to the protection given by s. 21, sub-s. 2, of the Conveyancing Act, 1881.

Assuming the purchaser to have been affected by notice, the defect in title was one which *might* have been waived, and the purchaser was entitled to assume that it had in fact been waived, in the absence of evidence to the contrary: see the dictum of Bowen L.J. in *Selwyn* v. *Garfit*. (1)

Owen Thompson K.C. in reply. In order to come within the exception of "a mortgagee in possession" mentioned in s. 1, sub-s. 2 (*b*), of the Act of 1914, to be qualified to sell, the mortgagee must be in possession at the commencement of the Act, and if he enters into possession afterwards, his possession must be lawful possession. And under the Act of 1916, the exception includes a mortgagee who before the commencement of that Act had appointed a receiver. (2) In *In re Provident Association of London and Gollogaly's Contract* (3) it was held that the exception mentioned in the Act of 1914 of "a mortgagee in possession" did not include a mortgagee who had entered into possession after the commencement of the Act with the leave of the Court. Here, the mortgagee did not go into possession until after the commencement of the Act of 1914, and she was not in possession at the time she sold, because she had gone out of possession before that time by appointing a receiver, as she had power to do: *Tillett* v. *Nixon*. (4) The letter of December 21, 1918, in which the plaintiff company raised no objection against Mrs. Bell appointing a receiver, did not amount to a waiver of its rights under the Act of 1914. It was not suggested that the plaintiffs in fact waived compliance with that Act. The replies to the defendants' requisitions were not sufficient; they put the defendants on further inquiry, and the statutory declaration carried the matter no further. In the absence of leave from the Court to exercise it, the power of sale was gone; the power only existed by leave of the Court. Non-

(1) 38 Ch. D. 273, 284.
(2) See note (1) ante, p. 811.
(3) [1917] 1 I. R. 240.
(4) (1883) 25 Ch. D. 238.

compliance with the Act in the exercise of the power was not exercising it "improperly or irregularly" within the meaning of s. 21, sub-s. 2, of the Conveyancing Act, 1881: that section afforded the defendants no protection.

The plaintiff company has not been guilty of laches. It had the statutory right to redeem during twelve years. It is not sufficient for the defendants to say that the plaintiffs delayed six or seven years before it brought an action to redeem. Ever since the sales to the defendants the plaintiffs have been insisting on their rights and have been in course of negotiations with the defendants. In a case where a statute of limitations is applicable, "the objection of simple laches does not apply until the expiration of the time allowed by the statute. But acquiescence is a different thing; it means more than laches": see per Lord Wensleydale in *Archbold* v. *Scully* (1); *In re Baker*. (2) No lapse of time will bar the right to redeem, when relief is sought against an improper and oppressive exercise of a power of sale by a mortgagee: see *Robertson* v. *Norris*. (3) In that case there was no acquiescence, but a series of attempts over a period of fifteen years to get relief. In *Nutt* v. *Easton* (4) the person entitled to the equity of redemption was held to be barred by laches and acquiescence with knowledge of the facts during ten years, but Cozens-Hardy J., who decided that case, must have had in mind that there was no statute of limitations applicable. In *Erlanger* v. *New Sombrero Phosphate Co.* (5) Lord Blackburn said that mere standing by without any alteration in the position of the defendant is not enough to affect the plaintiff with laches: where the plaintiff is relying on an equity, he must use due diligence, after he has had such notice or knowledge as to make it inequitable to lie by. And in *In re Sharpe* (6) a delay of $3\frac{1}{4}$ years by the liquidator after liquidation in taking action where the defendants were not prejudiced by the delay, was held not to be such laches as

(1) (1861) 9 H. L. C. 360, 383.
(2) (1881) 20 Ch. D. 230.
(3) (1858) 1 Giff. 421, 426; 4 Jur. (N. S.) 443.
(4) [1899] 1 Ch. 873.
(5) (1878) 3 App. Cas. 1218, 1279.
(6) [1892] 1 Ch. 154, 167, 168.

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would preclude the liquidator from recovering against the estate of a deceased director money paid to shareholders ultra vires.

LAWRENCE J. The first question to be decided is whether Mrs. Bell at the times when she purported to sell the various houses comprised in her mortgage had the right to exercise her power of sale.

The solution of this question depends upon the true effect, in the events which have happened, of s. 1 of the Courts (Emergency Powers) Act, 1914, which came into force on August 31, 1914. By that section it was enacted that, from and after the passing of the Act, no person should (inter alia) take or enter into possession of any property or realize any security (except by way of sale by a mortgagee in possession) without having first applied to the Court as therein mentioned. The relevant facts so far as this point is concerned are not seriously in dispute. The mortgaged property consisted of six leasehold houses. The mortgagor became bankrupt in 1912, and thereupon the plaintiffs entered into possession of the mortgaged property by appointing Mr. Martin to collect the rents on their behalf. This state of affairs continued down to the end of November, 1914, when Mrs. Bell without having applied to the Court took possession by appointing the same Mr. Martin to collect the rents on her behalf. This action on the part of Mrs. Bell was in direct contravention of the provisions of s. 1 of the Courts (Emergency Powers) Act, 1914. On March 29, 1915, Mrs. Bell, having apparently realized the illegality of her action, by writing under her hand appointed Mr. Martin receiver under the power in that behalf contained in s. 19 of the Conveyancing Act, 1881, thus putting an end to her unlawful possession and regularizing her position under the Courts (Emergency Powers) Act, 1914. Mr. Martin thereupon became the agent of the mortgagor, under s. 24 of the Conveyancing Act, 1881. Matters remained in that position until the purported sales which are complained of in this action. In 1918 and 1920, Mrs. Bell, without having first applied to the Court, purported to sell the mortgaged

property in several lots to various purchasers, holding herself out to them as mortgagee in possession and not disclosing the fact that she had appointed a receiver. A point was taken on behalf of the defendants that, having once entered into possession, Mrs. Bell could not at her own pleasure go out of possession again, and that the appointment of Mr. Martin as receiver was therefore invalid and nugatory, and that she in fact remained a mortgagee in possession up to the time when she purported to sell. In support of this contention *In re Prytherch* (1) was cited. In that case North J. held that a mortgagee, once having gone into possession, had no right to give up that possession at pleasure. The plaintiffs, in answer to this contention, referred to the case of *Tillett* v. *Nixon* (2), where Pearson J. stated that he had no doubt that a mortgagee in possession might appoint a receiver under the Conveyancing Act. In view of the unrestricted power conferred by s. 19, sub-s. 2, of the Conveyancing Act, 1881, I respectfully concur in the opinion expressed by Pearson J. In *In re Prytherch* (1) North J. was not considering the power of a mortgagee in possession to appoint a receiver under the Conveyancing Act, 1881, but was dealing with the question of a mortgagee in possession desiring to give up that possession by procuring the Court to appoint a receiver. It is the fact, however, that the appointment of a receiver by a mortgagee in possession has the effect of relieving the mortgagee from his position and responsibility, as a mortgagee in possession, and operates to place the mortgagor again in possession of the mortgaged property; and, therefore, the opinion expressed by North J., if taken literally and divorced from its context, may be said to conflict with the opinion of Pearson J. and to cover the case of a mortgagee going out of possession by means of the appointment of a receiver. Be that as it may, in the circumstances of the present case, I have no hesitation in holding that Mrs. Bell was justified in appointing a receiver, as, at the time of the appointment, she was in unlawful possession of the mortgaged property, and it was her duty, directly she realized her position, to put an end to such

(1) 42 Ch. D. 590. (2) 25 Ch. D. 238.

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possession. Apart from her position as mortgagee in possession, she was entitled in March, 1915, without first applying to the Court, to appoint a receiver, as the Courts (Emergency Powers) (No. 2) Act, 1916, had not then been passed. In my opinion, therefore, the contention that the appointment was invalid and nugatory and that she still remained a mortgagee in possession fails.

It was further contended on behalf of the defendants that on the true construction of s. 1 of the Courts (Emergency Powers) Act, 1914, a mortgagee was entitled to realize his security by way of sale if he were in fact in possession, although he had gone into possession after the commencement of the Act without having first made the necessary application to the Court. In my opinion, this contention is ill founded. The exception from the prohibition against realizing a security in favour of a mortgagee in possession must, in my judgment, be limited to a mortgagee who is lawfully in possession, and does not extend to a mortgagee who has wrongfully taken possession in contravention of the express provisions of the Act. In the Irish case of *In re Provident Association of London and Gollogaly's Contract* (1), it was held that the exception was restricted to a mortgagee who was in possession at the date of the passing of the Act, and did not extend to a mortgagee who had entered into possession after that date with the leave of the Court. It is not necessary for me to express an opinion upon the correctness of this decision. The short and conclusive answer to the defendants' contention on this point is that Mrs. Bell was not in fact in possession at the time when she purported to exercise her power of sale. Moreover, the appointment by her of a receiver on March 29, 1915, did not operate under the Courts (Emergency Powers) (No. 2) Act, 1916, or otherwise, to place her in the position of being able to realize her security by way of sale, without first applying to the Court. In the result, I have come to the conclusion that Mrs. Bell had no right to exercise her power of sale at the time when she purported to exercise it.

The question then arises whether the defendant purchasers

(1) [1917] 1 I. R. 240.

acquired good titles as bona fide purchasers for value without notice of the fact that Mrs. Bell had no right to exercise her power of sale.

The relevant facts on this point are that Mrs. Bell purported to sell the property as a mortgagee who had gone into possession after August 31, 1914. As already mentioned the appointment of a receiver was not disclosed. All the purchasers' advisers appear to have appreciated that, in order to obtain a good title, it was necessary that it should be established, either that Mrs. Bell had entered into possession before August 31, 1914, or, if not, that the leave of the Court had been obtained to her going into possession or realizing her security; and all the purchasers made requisitions directed to these points.

For some reason which has not been satisfactorily explained, the purchasers seem to have been content with a statutory declaration by Mrs. Bell to the effect that the plaintiffs' agent, Mr. Martin, had collected the rents for some years before December, 1914, on behalf of the plaintiffs and that, after that date, the same agent had collected the rents on behalf of Mrs. Bell. What, therefore, the purchasers learnt in substance was that Mrs. Bell had gone into possession after the commencement of the Courts (Emergency Powers) Act, 1914, and that no application had been made to the Court either before she had entered into possession or before she had proceeded to realize her security by way of sale. Thus they had direct notice that Mrs. Bell was not in a position to sell the mortgaged property under her power of sale, and yet they proceeded to complete their purchases. It is more than probable that if the parties had pursued their inquiries—as I think it was their duty to do—they would have learnt the true facts and would have discovered that the vendor was not in possession of the property at all, as it is not suggested that the non-disclosure of the appointment of a receiver was fraudulent or was due to anything more than forgetfulness on the part of Mrs. Bell's solicitor. But, even if the inference that the purchasers would by making further inquiries have ascertained the fact that Mrs. Bell was not

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in possession is not warranted, yet it is clear to my mind that the purchasers had ample notice that Mrs. Bell was not in a position to exercise her power of sale, and, therefore, could not make a good title.

It was suggested, however, that the purchasers, notwithstanding the notice which they had received, had acquired a good title as against the plaintiffs, because they were justified in assuming that the plaintiffs had waived their right to object to the sale, on the ground that the statutory declaration stated that the plaintiffs' agent, Mr. Martin, subsequently became the agent for Mrs. Bell, and that this fact necessarily implied that the plaintiffs consented to Mrs. Bell going into possession. The first answer to this suggestion is that there is no evidence that the purchasers did, in fact, make any such assumption. On the contrary, I gathered that the real reason why the purchasers accepted the title was because their advisers seem to have come to the erroneous conclusion that the fact that the plaintiffs were in possession at the date of the passing of the Courts (Emergency Powers) Act, 1914, was sufficient to enable Mrs. Bell to realize her security without first applying to the Court. In the second place, I hold that the facts stated in the declaration did not warrant the assumption that the plaintiffs had waived their rights under the Act. Mrs. Bell's action was, on the face of it, illegal, and, if the purchasers intended to rely on a waiver of the illegality, they were, in my opinion, bound to make all proper inquiries whether such waiver had in fact taken place. Inquiry from either Mrs. Bell or from the plaintiffs would have at once disclosed that all that the plaintiffs had done was to consent to Mr. Martin being appointed as receiver.

The defendants on this part of the case also relied upon the provisions of s. 21, sub-s. 2, of the Conveyancing Act, 1881. In my opinion this section does not afford them any protection in the circumstances of this case. It is well settled that the section does not protect a purchaser buying with notice of some impropriety or irregularity in the exercise of a power of sale. Moreover, in my opinion, the section does not apply to a case where the exercise of the power has been expressly

prohibited by statute. An attempted exercise of the power in contravention of such an enactment seems to me to be outside the purview of the section, and cannot properly be called merely an improper or irregular exercise of the power. In my opinion the effect of the Act of 1914 is to abrogate the power, unless the requirements of the Act are complied with.

In the result, for the reasons stated, I have come to the conclusion that the purchasers cannot sustain the plea that they were bona fide purchasers for value without notice.

An attempt was made to draw a distinction between the position of the defendants Abbott and Taylor and that of the defendant Burghes on this branch of the case. In my judgment, however, no distinction can properly be drawn between these defendants. As to the defendant Abbott, his solicitors were furnished with the conditions of sale and a copy of Mrs. Bell's statutory declaration, the latter having been sent to them in direct response to a requisition on the very point whether the vendor had the right to exercise her power of sale in view of the provisions of s. 1 of the Courts (Emergency Powers) Act, 1914. Mr. Saint (the member of the firm of solicitors acting for Mr. Abbott) stated in the witness box that he had no recollection of having read these documents after they were sent to him, and that he either did not read them or paid no particular attention to their contents, but that he relied mainly on the fact that Messrs. Wood & Sons had accepted the title on the previous sales. In these circumstances I decline altogether to hold (as Mr. Hewitt invited me to do) that the defendant Abbott was not, through his solicitor, affected with notice of the contents of these documents. In my judgment, as regards notice, this defendant stands in exactly the same position as the defendant Burghes.

As regards the defendant Taylor, he purchased in 1920, from the defendant Burghes, and Messrs. Wood & Sons, who had acted for him on his purchase from Mrs. Bell, acted for both vendor and purchaser on this occasion. It is hopeless

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to contend that the defendant Taylor was not affected with notice, as it is obvious that all the relevant facts and documents would have come to the knowledge of his solicitors as such, if they had made such inquiries and inspection as ought reasonably to have been made by them: see Conveyancing Act, 1882, s. 3, sub-s. 1 (ii.).

The next point is whether the plaintiffs did, in fact, waive the provisions of s. 1 of the Courts (Emergency Powers) Act, 1914, and consent to Mrs. Bell going into possession. There can, I think, be no doubt that it was competent for the plaintiffs to waive any application by Mrs. Bell to the Court before entering into possession or selling the property.

The only evidence which the defendants have referred to in support of the plea of waiver is the letter written by Mr. William Reginald Wood on behalf of the plaintiffs on December 21, 1914, stating that the plaintiffs had no objection to Mrs. Bell appointing Mr. Martin receiver. In my opinion the letter does not purport to waive any rights under the Act, and did not operate as a waiver of any such rights. As already pointed out, the plaintiffs could not prevent the appointment by Mrs. Bell of a receiver, and the letter merely consents to Mr. Martin being appointed to that office. There is nothing in this letter which in any way supports the contention that the plaintiffs consented to Mrs. Bell entering into possession of the mortgaged premises. As regards any consent on the part of the plaintiffs to Mrs. Bell realizing her security by way of sale, that is out of the question, as the plaintiffs never knew of any of the sales until after they had been completed. In my judgment the plea of waiver fails.

It was further contended by Mr. Hewitt that, even if all the before mentioned points should be decided against the defendants, the only remedy which the plaintiffs had was to recover damages against Mrs. Bell or her estate, in other words that, however wrongful the action of Mrs. Bell might have been and to whatever extent the purchasers might have known or been affected with notice of such wrongful

action, their position was unassailable and that the sales must stand, with the result that the plaintiffs had lost their equity of redemption in the mortgaged property and the defendants had acquired a good title. In support of this contention Mr. Hewitt cited the case of *Hemmings* v. *Stoke Poges Golf Club* (1), and referred especially to the passage in Bankes L.J.'s judgment, where the learned Lord Justice referred to the well known general rule that an individual can maintain an action for damages for the breach of a statutory duty where such duty has been imposed for his benefit and he has suffered damages by the breach. In my judgment that case is no authority for the proposition contended for in the present case. There can, I think, be no reasonable doubt that s. 1 of the Courts (Emergency Powers) Act, 1914, was enacted for the benefit (inter alia) of mortgagors and others interested in the equity of redemption of the mortgaged property, and that any person suffering loss by any breach of the provisions of that section might recover damages against the wrongdoer; but that is not, in my opinion, the only remedy available in this Court in circumstances like the present. It is a well established rule of this Court that a purchaser of land with notice of a defect in the title acquires no better title than his vendor can give him and, consequently, that any purchaser acquiring property from a mortgagee who is purporting to sell under his power of sale does not obtain a good title, if he knows or has notice that the power of sale is not exercisable. It is further well settled that the person or persons whose estates or interests are attempted to be defeated by any such transaction can in this Court assert their title to the property. In my judgment this contention fails.

The next question to be considered is whether the plaintiffs have been guilty of laches, so as to disentitle themselves to the relief which otherwise they could have obtained.

It frequently happens in this Court that laches or delay in taking proceedings for a period falling short of the time

(1) [1920] 1 K. B. 720, 731, 732.

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fixed by some statute of limitations is relied upon as a bar to the relief claimed, and that (as has happened in the present case) such a plea gives rise to difficult questions. In my judgment, there is no hard and fast rule as to the length of delay which will operate as a bar. Various authorities have been cited in which the Court has held that a particular length of delay has or has not operated as a bar, but in my opinion no useful purpose would be served by reviewing those authorities, as each case must depend upon its own particular facts. The following passage from the judgment of the Privy Council in *Lindsay Petroleum Co.* v. *Hurd* (1), cited by Lord Blackburn with approval in *Erlanger* v. *New Sombrero Phosphate Co.* (2), may usefully be cited as a guide in such cases—namely, " Two circumstances always important in such cases are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy." [His Lordship then stated the facts above mentioned, which bore upon the question of laches on the part of the defendants, and continued :] Mr. W. R. Wood in the witness box stated that he had deliberately not commenced proceedings before he did, because he considered that he could redeem at any time within twelve years, and I infer that the plaintiffs had not sufficient funds available until the writ was issued. Thus the length of delay between the time when the plaintiffs first got to hear of the sales and the date when effective proceedings were commenced was about $6\frac{3}{4}$ years in the case of the four houses in the possession of the defendant Burghes, $6\frac{1}{2}$ years in the case of the house now in the possession of the defendant Taylor, and about five years in the case of the house in the possession of the defendant Abbott. Some weight, in my opinion, attaches to the argument that in any event no laches ought to be imputed to the plaintiffs until after the expiry on August 31, 1922, of the Courts (Emergency Powers) Act, 1914, as otherwise the plaintiffs would, owing to the

(1) L. R. 5 P. C. 221, 240. (2) 3 App. Cas. 1218, 1279.

wrongful action of Mrs. Bell, be deprived of the benefit of the provisions of s. 1, since no action for redemption could have been started without the plaintiffs having to provide the necessary money to pay off the mortgage. If this argument be sound, the length of delay as regards all the houses would be reduced to $2\frac{1}{2}$ years. Apart from this contention, however, the following matters have, in my opinion, to be taken into consideration. In none of the cases did the plaintiffs hear of the sale until after it had been completed and the purchaser had been put in possession. In each case, however, the purchaser received a warning that his title was open to question within a comparatively short time after the purchase, and nothing has been done apart from delay in taking proceedings by the plaintiffs which could have led the purchasers to believe that they had waived their rights. Further, no evidence has been adduced on behalf of the defendants that they did any act in the interval between the date of their purchase and the date of the issue of the writ which could materially affect the equities between the parties as they existed at the date when the plaintiffs first acquired knowledge of their rights. Taking all the circumstances into consideration, I have come to the conclusion that the defence of laches or delay is not well founded.

In the result, I am of opinion that the right of redemption in the property comprised in the mortgage to Mrs. Bell is still subsisting, and that the plaintiffs are entitled to assert such right as against all the defendants.

I have hitherto not mentioned the defendant Helen Agnew, who was one of the purchasers at the sale by Mrs. Bell in April, 1918. At the time when the plaintiffs commenced this action they were unaware that this defendant had purchased merely as the nominee of and as trustee for the defendant Burghes. She has appeared by the same solicitors as the defendant Burghes, and was not represented by separate counsel at the trial. In these circumstances, I think that the proper order to make is that the action be dismissed as against her, and that the plaintiffs be ordered to pay any

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costs of the action which she may have incurred apart from the defendants with whom she was joined.

The exact form of the judgment may require some consideration. In my opinion the defendants are entitled to be treated as transferees pro tanto of the mortgage debt in the proportions of the purchase prices paid to Mrs. Bell in respect of each lot on the original sale of such lot.

Minutes of the judgment as finally settled were:—

Declare that the right of redemption in the hereditaments and premises comprised in the mortgage dated September 14, 1911, in the pleadings mentioned is still subsisting, and order that the following accounts be taken, that is to say:—

1. An account of what is due under and by virtue of the said mortgage.

2. An account of the rents and profits of the said hereditaments and premises or any of them received by the defendant Horatio White Abbott (hereinafter called "the defendant Abbott") or by any other person or persons by the order or for the use of the defendant Abbott, but such account is not to be taken on the footing of wilful default.

3. An account of the rents and profits of the said hereditaments and premises or any of them received by the defendant George Henry Burghes (hereinafter called "the defendant Burghes") or by any other person or persons by the order or for the use of the defendant Burghes, but such account is not to be taken on the footing of wilful default.

4. An account of the rents and profits of the said hereditaments and premises or any of them received by the defendant Charles Taylor (hereinafter called "the defendant Taylor") or by any other person or persons by the order or for the use of the defendant Taylor. And in taking such account an annual value by way of occupation rent is to be set on any part of the said hereditaments and premises whereof the defendant Taylor has been in actual occupation, but such account is not to be taken on the footing of wilful default.

And it is ordered that the defendant Taylor be charged therewith in taking such account.

Order that what shall be certified to be due on Account No. 2 be deducted from $\frac{80}{525}$ of what shall be certified to be due on Account No. 1, and the balance certified. And it is ordered that upon the plaintiffs paying to the defendant Abbott what shall be certified to be such balance within six months after the date of the Master's certificate at such time and place as shall be thereby appointed the defendant Abbott do reassign and surrender the hereditaments and premises No. 13 Chestnut Road, Ashford, comprised in the said mortgage free and clear from all incumbrances done by him or any persons claiming by from or under him or by those under whom he claims and deliver up (upon oath if required) all deeds and writings in his custody or power relating thereto to the plaintiffs or to whom they shall appoint. But in default of the plaintiffs paying to the defendant Abbott what shall be certified to be due to him as aforesaid by the time aforesaid. Order that this action do stand dismissed out of Court as against the defendant Abbott and in that case Order that the plaintiffs do pay to the defendant Abbott his costs of this action subsequent to this judgment, such costs to be taxed by the Taxing Master. And it is ordered that what shall be certified to be due on account No. 3 be deducted from $\frac{365}{525}$ of what shall be certified to be due on Account No. 1, and the balance certified.

Then followed an order (similar to that in the case of the defendant Abbott) upon redemption by the plaintiffs of the mortgaged hereditaments, 14, 16, 17 and 18 Chestnut Road for the reassignment or surrender thereof by the defendant Burghes, or in default of redemption for the dismissal of the action as against that defendant, and for payment to him of his costs of the action subsequent to judgment.

And Order that what shall be certified to be due on Account No. 4 be deducted from $\frac{80}{525}$ of what shall be certified to be due on Account No. 1, and the balance certified.

And then followed an order (similar to that in the case of the defendant Abbott) upon redemption by the plaintiffs of

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No. 15 Chestnut Road for the reassignment or surrender thereof by the defendant Taylor, or in default of redemption for the dismissal of the action as against that defendant, and for payment to him of his costs of the action subsequent to judgment.

Solicitors: *Gale Thomas & Son; Wood & Sons; H. B. Wedlake, Saint & Co.*

H. C. H.

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In re PARK WARD AND COMPANY, LIMITED.

[00553 of 1925.]

Company—Winding Up—Debenture issued between Date of Presentation of Petition and Date of Winding-up Order—Knowledge of Presentation of Petition—Summons for Declaration of Validity of Debenture—Costs of Application—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 205, *sub-s.* 2.

Between the date of the presentation of a petition for the winding up of a company and the date of the order for its compulsory winding up a debenture was issued by the company to secure to the debenture-holder the repayment of 1200*l.* advanced to enable the company to pay wages due to the staff. A summons was taken out by the debenture-holder for an order validating his debenture, notwithstanding the provisions of s. 205, sub-s. 2, of the Companies (Consolidation) Act, 1908. The debenture-holder was, at the time of the issue of the debenture, aware that the petition for the winding up of the company had been presented:—

Held, that, notwithstanding his knowledge of the presentation of the petition, he was entitled to a declaration that the debenture was valid; that the costs of his successful application might well be regarded as mortgagee's costs, and must, therefore, be added to his security; and that the costs of the liquidator must be included in his costs of the liquidation.

In re Wiltshire Iron Co. (1868) L. R. 3 Ch. 443 applied.

ADJOURNED SUMMONS WITH WITNESSES.

A petition for the winding up of Park Ward & Co., Ld., was presented on December 8, 1925. On December 16, 1925, a debenture was issued by the company to secure the sum of 1200*l.* advanced by the debenture-holder for the payment of the wages of the staff of the company. The debenture-

holder was aware, when he agreed to advance the money, that the petition had been presented. On January 12, 1926, an order was made for the compulsory winding up of the company. This summons was taken out by the debenture-holder for an order validating his debenture, notwithstanding s. 205, sub-s. 2, of the Companies (Consolidation) Act, 1908. (1)

Sir Thomas Hughes K.C. and *Wilfrid Hunt* for the applicant. Where, after the presentation of a petition, the directors think that the company can be saved and they borrow cash to save it and give security, the Court, in the exercise of its jurisdiction under s. 205 of the Act of 1908, ought to declare that security good. It would be disastrous if a petition of this kind were to be the means of preventing the directors from doing their best for the company. Having regard to the observations of Lord Cairns in *In re Wiltshire Iron Co.* (2) as to the effect of the corresponding section in the Companies Act, 1862, this is clearly a case in which the Court should accede to the application.

Clayton K.C. and *W. F. Swords* for the liquidator. The application ought not to succeed, as the applicant had, at the date when he lent the money, knowledge that the winding-up petition had already been presented.

[They referred to *In re London, Hamburg and Continental Exchange Bank.* (3)]

The applicant ought to pay the costs of the application. Under s. 205 he is compelled to come to the Court to obtain relief and, under the circumstances, he ought to pay for the indulgence.

Sir Thomas Hughes K.C. in reply. It is not only a matter of indulgence. A transaction of this kind ought to be supported by the Court, and the proper course is for the costs to be costs in the winding up.

(1) Companies (Consolidation) Act, 1908, s. 205, sub-s. 2: "In the case of a winding up by or subject to the supervision of the Court, every disposition of the property (including things in action) of the company . . . . made after the commencement of the winding-up shall, unless the Court otherwise orders, be void."

(2) L. R. 3 Ch. 443, 446.

(3) (1866) L. R. 2 Eq. 231.

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ROMER J. This is an application by Mr. G. J. Rowley asking for an order validating his debenture, notwithstanding the provisions of s. 205 of the Companies (Consolidation) Act, 1908. Apart from the question of its date there is no doubt that this is a valid debenture. But it appears that the petition upon which the order for the winding up of the company was made on January 12, 1926, was presented on December 8, 1925. The debenture was therefore created after the commencement of the winding up.

By s. 205, sub-s. 2, of the Act of 1908, it is provided as follows: "In the case of a winding up by or subject to the supervision of the Court, every disposition of the property (including things in action) of the company, ... made after the commencement of the winding up, shall, unless the Court otherwise orders, be void." In *In re Wiltshire Iron Co.* (1) Lord Cairns, in the course of his judgment, referring to the corresponding section of the Companies Act, 1862, says: "The 153rd section no doubt provides that all dispositions of the property and effects of the company made between the commencement of the winding up (that is the presentation of the petition) and the order for winding up, shall, unless the Court otherwise orders, be void. This is a wholesome and necessary provision, to prevent, during the period which must elapse before a petition can be heard, the improper alienation and dissipation of the property of a company in extremis. But where a company actually trading, which it is the interest of every one to preserve, and ultimately to sell, as a going concern, is made the object of a winding-up petition, which may fail or may succeed, if it were to be supposed that transactions in the ordinary course of its current trade, bona fide entered into and completed, would be avoided, and would not, in the discretion given to the Court, be maintained, the result would be that the presentation of a petition, groundless or well founded, would, ipso facto, paralyze the trade of the company, and great injury, without any counterbalance of advantage, would be done to those interested in the assets of the company."

(1) L. R. 3 Ch. 443, 446.

I must therefore consider the circumstances in which this debenture came to be issued. The position was this. The company was carrying on business and employing many workmen. Their wages fell due on Friday, December 11, three days after the presentation of the petition. In this state of affairs Mr. Rowley was approached by the secretary with the object of inducing him to advance to the company moneys sufficient to pay the wages of the workmen on the Friday. To that request Mr. Rowley acceded, on the terms that he should receive a debenture for the amount advanced. Had he not done so the wages would not have been paid and the business, temporarily at any rate, would have had to be closed down. The 1200*l.* was accordingly advanced by Mr. Rowley, for the purpose of preserving the business as a going concern. The transaction between him and the company was therefore just the sort of transaction which Lord Cairns thought it was the object of the proviso to the section to preserve and which ought to be rendered valid by an order of the Court.

During the negotiations for the debenture Mr. Rowley knew that the petition had been presented, and Mr. Clayton asks me to come to the conclusion that the power under the section ought not to be exercised in favour of a person who, at the date of the transaction in question, had knowledge that a petition had been presented. There appears to be no definite authority on that point, but my attention was drawn to a decision of Lord Romilly in *In re London, Hamburg and Continental Exchange Bank.* (1)

That case however related to a transfer of shares after the presentation of a winding-up petition, and to such a case different considerations apply. If I were to adopt the view put forward by Mr. Clayton, a company would in very few cases be able to obtain the assistance necessary to enable it to carry on business as a going concern. Lord Cairns evidently regarded the power given to the Court by the section as one given for the benefit and in the interests of the company, so as to ensure that a company which is made

(1) L. R. 2 Eq. 231.

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the subject of a winding-up petition may nevertheless obtain money necessary for carrying on its business and so avoid its business being paralysed.

If, therefore, I were to hold that no one who knows of the presentation of a petition can safely enter into any arrangement with the company, I think I should be depriving the company of the benefit which, according to Lord Cairns, the provision of the section was intended to secure to it.

In the present case the business of the company was eventually sold as a going concern. Had it not been for the timely assistance given by Mr. Rowley I very much doubt whether this would have been possible. I think therefore that I ought to accede to his application.

In so doing I would add that I see no reason why an applicant, in circumstances of this kind, ought to be obliged to come to the Court at his own cost. What Mr. Rowley did was for the benefit of the company and not for his own benefit. It follows that the costs of the successful application may well be regarded as mortgagee's costs, and I therefore direct that he add them to his security. The costs of the liquidator will be included in his costs of the liquidation.

Solicitors: *Bulcraig & Davis; Doyle, Devonshire & Co.*

J. L. D.

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In re CLARK.

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[1925. C. 537.]

Will—Trust Fund—Life Interest—Provision against Alienation—Bankruptcy of Life Tenant—Discharge from Bankruptcy conditional on payment of certain Sum to Official Receiver—Liability not discharged—Destination of Income of Trust Fund during Continuance of Liability—Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59), *ss.* 38, 167.

A testator by his will directed his trustees to hold a sum of 15,000*l.* in favour of his son, C. E. C., and his wife and issue "upon trust to invest the same and to pay to my said son . . . . so much of the annual income thereof accruing due in his lifetime as would not, although the same were payable to him, be by his act or default or by operation of law so disposed of as to prevent his personal enjoyment thereof, and to apply so much of the said annual income thereof as would, if the same were payable to him, be disposed of as aforesaid for the benefit of his wife, children and other issue for the time being in existence. . . . ." The testator died in 1896. His son, the tenant for life, married in 1897, and had four children. In 1914 the tenant for life was adjudicated bankrupt, and thereupon the trustees applied the income derived from the trust fund in favour of his wife and children. On July 11, 1922, he was granted his discharge from bankruptcy, conditionally on his consenting to judgment being entered against him in a sum of 50*l.* in favour of the official receiver. Some of that amount was still unpaid.

The question raised by this summons was whether the income of the fund accruing due in the hands of the trustees since July 11, 1922, was payable to the tenant for life or should be applied for the benefit of his wife and children:—

Held, that on the true construction of the will, and in the events which had happened, there had been a forfeiture, and that, so long as the bankruptcy continued, that forfeiture would remain operative in respect of each instalment of income accruing due.

THE testator, by his will dated April 14, 1896, appointed the defendant, Timothy Foord, Charles Richard Moxon, and his son, the defendant, Charles Edward Clark, to be the executors and trustees thereof. After making certain bequests he devised and bequeathed all his real and the residue of his personal estate to his trustees, upon trust to sell and convert, and out of the proceeds and his ready money to pay his funeral and testamentary expenses and debts, and the legacies thereby bequeathed, and upon further trust to hold a sum

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of 15,000*l.* in favour of the defendant, C. E. Clark, and his wife and issue, "upon trust to invest the same and to pay to my said son, Charles Edward Clark, so much of the annual income thereof accruing due in his lifetime as would not, although the same were payable to him, be by his act or default or by operation of law so disposed of as to prevent his personal enjoyment thereof, and to apply so much of the said annual income thereof as would, if the same were payable to him, be disposed of as aforesaid for the benefit of his wife, children and other issue for the time being in existence, or some one or more of those objects, if any and if none," then as therein mentioned in such proportions at such time and in such manner as his trustees should in their absolute discretion think fit, and the testator gave directions as to the disposal of the capital of the 15,000*l.* as therein mentioned.

The testator died on June 13, 1896, and his will was duly proved by his executors. Shortly after his death the trust legacy of 15,000*l.* was duly provided for and invested in the names of the trustees. In June, 1915, the defendant, C. E. Clark, retired from the trusts of the will. In April, 1922, C. R. Moxon died, and in July, 1922, the defendant, Martha Moxon, was appointed trustee. In November, 1897, the defendant, C. E. Clark, married the plaintiff, Clara Howard Clark. There were four children of the marriage, two of whom were plaintiffs in the present proceedings.

On June 5, 1914, a receiving order in bankruptcy was made against the defendant, C. E. Clark, and he was subsequently adjudicated a bankrupt. Thereupon the trustees ceased to pay him the income of the trust legacy, and applied such income from time to time for the benefit of his wife and children. On July 11, 1922, he was granted his discharge from bankruptcy, conditionally on his consenting to judgment being entered against him in a sum of 50*l.* in favour of the official receiver. Some of that amount was still unpaid. From July, 1922, to May, 1924, the trustees of the will, acting upon the view that the forfeiture no longer operated, paid the income of the trust legacy to the defendant Clark. Since

May, 1924, they paid it on the joint receipt of the husband and wife, the point having been taken that in regard to the income there was still obtaining an operative forfeiture.

Under these circumstances this summons was issued by the plaintiffs, and it raised the question whether the income of the trust legacy should be paid to the defendant Clark, or should be applied for the benefit of his wife and children.

Spens K.C. and *J. E. Harman* for the plaintiffs. Although it may be true that under this form of trust the tenant for life takes no vested interest in any part of the income until it has accrued in the hands of the trustees, yet when it has so accrued it comes within the definition of "property" in s. 167 of the Bankruptcy Act, 1914, and becomes vested in the trustee in bankruptcy under s. 38. Here, however, an event has happened which has created a forfeiture, and under this form of protected life interest when once there is a forfeiture, there is a forfeiture for good, complete and final: *Robertson* v. *Richardson* (1); *Metcalfe* v. *Metcalfe*. (2) If the limitations of the gift over confer any other interest on the tenant for life, that interest also passes, on bankruptcy, to the trustee in bankruptcy: *Kearsley* v. *Woodcock*. (3) If in fact a fund of income has accrued in the hands of trustees, payable to a tenant for life under a protected life interest, at the date when a creditor obtains a garnishee order, the trustees must hand over such fund to the creditor: *In re Sampson*. (4) In the circumstances of this case, whatever other interest the tenant for life had, he had a contingent interest, which, on bankruptcy, became vested in the trustee in bankruptcy, and became subject to the clause in the will. The fact that he has obtained his discharge makes no difference.

Beebee for the defendant, C. E. Clark. The interest in this fund is really not a contingent interest, but only arose on the act of bankruptcy. The title to each instalment

(1) (1885) 30 Ch. D. 623.
(2) [1891] 3 Ch. 1.
(3) (1843) 3 Hare, 185.
(4) [1896] 1 Ch. 630.

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only arises when it accrues, and each instalment so accruing since the date of his discharge is payable to the tenant for life.

[He cited *In re Greenwood* (1) and *In re Jenkins.* (2)]

TOMLIN J. In this case I have to determine whether upon the true construction of the will of the testator who died on June 13, 1896, and in the events which have happened, there is operative to-day in respect of the income of a trust legacy of 15,000*l.*, a forfeiture which is said to have taken place by reason of the bankruptcy in June of 1914 of the first defendant to the summons, the tenant for life under the trusts of the legacy in question. [His Lordship dealt with the facts and continued:] The clause in the will is in a somewhat unusual form. It is not in the common form of a trust to pay the income to the beneficiary until the happening of some event whereby such income belonging to him absolutely would become vested in some other person. It is a trust to pay to the son "so much of the annual income thereof accruing due in his lifetime as would not, although the same were payable to him, be by his act or default or by operation of law so disposed of as to prevent his personal enjoyment thereof." That must mean that it is a trust in relation to which there has to be considered, at the point of time when any income accrues due, whether or not at that point of time the same has been so disposed of either by his own act or default or by operation of law as to prevent his personal enjoyment thereof.

Now in those circumstances it is necessary to consider what is the effect upon the clause of the bankruptcy followed by the discharge. Bankruptcy vests in the trustee in bankruptcy the property of the bankrupt subject to the limitation which appears in s. 38 of the Bankruptcy Act, 1914. Under s. 38: "The property of the bankrupt divisible amongst his creditors, and in this Act referred to as the property of the bankrupt, shall not comprise" certain particulars, that is, trust property, tools of trade, and so on, "but it shall comprise the following particulars: (*a*) All

(1) [1901] 1 Ch. 887. (2) [1915] 1 Ch. 46.

such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge." And by s. 167 of the Act: " 'Property' includes money, goods, things in action, land, and every description of property, whether real or personal and whether situate in England or elsewhere; also obligations, easements, and every description of estate, interest, and profit, present or future, vested or contingent, arising out of or incident to property as above defined." Perhaps it would be difficult to find a phrase more comprehensive than that.

The question, therefore, arises whether on the bankruptcy there was, in respect of this interest of the bankrupt under this trust, any property which vested in the trustee in bankruptcy. If there was, it seems to follow that, notwithstanding the discharge, in respect of any instalment of income accruing due after the discharge, so long as the bankruptcy remains in operation the title of the trustee would, but for the provisions of the forfeiture clause, prevail with regard to anything that the bankrupt takes, and that therefore there must be in respect of each instalment an operative forfeiture. But it is said on behalf of the bankrupt that in fact the interest which he takes under the trust in question is nothing more than a mere spes successionis or some interest (if "interest" is the right word), or some possibility in the nature of a spes successionis; that there was nothing which in fact vested in the trustee upon the bankruptcy, and that, therefore, inasmuch as the bankrupt obtained his discharge in July, 1922, the title to each instalment of income accruing after the date of that discharge is a new title acquired or devolving after the discharge and not passing to the trustee at all. It has been urged by Mr. Beebee that the interest is in the nature of the interest of the next of kin or a husband who may become entitled to a right by courtesy or even of beneficiaries whose only interest arises under the exercise of a power. In all those cases, it is plain that there is no property right before the event which gives rise to the interest, that is, either the death of the intestate, or the

TOMLIN J. succession of the wife in possession to the estate, or the exercise of the power. And so here, it is said, there is no interest or title until in fact the event happens upon which it is determined how the money is to go. I invited some explanation from the Bar as to what is the test by which the Court can determine whether a case falls on one side of the line or the other, that is to say, whether it is one of these mere possibilities or whether it is really a property interest. I did not get (perhaps because it was not possible to give it) any explanation as to what the true test should be, and, for my part, I do not propose to attempt to suggest a test myself. I am, however, satisfied that, where there is a trust of a fund under the terms of which the trustees are bound to apply the income of the fund in a particular way on a given future contingency, the person who takes the income as a result of that trust on the happening of the contingency is a person who has an interest of a kind which is capable of vesting in his trustee in bankruptcy. My attention was called to the case of *Kearsley* v. *Woodcock*. (1) Whatever be the particular result of that case, it shows that the interest of the bankrupt which arose in the fund as the result of the forfeiture occasioned by his bankruptcy was an interest which vested in his trustee. So here, it seems to me that on construction there is created an interest of a kind which vests in the trustee, and that the test therefore must be as to each block of income which accrues whether there is or is not still in operation the trustee's interest, and if it is in operation, then in regard to that block of income there is a forfeiture, and the income must be applied under the trust which arises upon the forfeiture. This construction of the clause does not in the least render the clause an inoperative clause. There may well be events in which it will take effect precisely in its terms. For example, if the bankruptcy was annulled to-morrow, the provision in regard to income accruing thereafter would apply, and in regard to those subsequent instalments of income there would be no forfeiture, notwithstanding the bankruptcy, unless and until

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(1) 3 Hare, 185.

there happened some subsequent event which operated to create a new forfeiture.

Now it has been urged on behalf of the defendant that I am precluded from arriving at the conclusion which I have indicated, or, if not precluded, I shall be rash in doing so, in view of some measure of guidance which has been afforded to me by the judgment of Stirling J. in *In re Sampson*. (1) That is a case where the terms of the trust were in fact identical with the terms of the trust here; indeed it is, I am told, the only case in the books where this particular form of trust is to be found. But the matter which Stirling J. had to consider in that case was a different matter from that which I have to consider. In that case the trustees had in their hands a sum representing income due and payable to the son of the testator who was the person entitled to receive the income under the terms of the trust similar to that in this case. Having that money in their hands, "they were served by the creditors of the son with a garnishee order attaching the money in their hands, and in pursuance thereof they paid over the money to the creditors. On an application by the son's wife to recover it from the trustees, held, that the trusts of the income during the son's life were valid in law; that the time at which the destination of any instalment of income was to be determined was the moment at which that instalment either became due or was in the hands of the trustees ready for application under the trusts of the will; that the son's title to the money accrued on April 16, 1895"—that is when the trustees received it—"and that the plaintiff consequently never became entitled to the benefit of the discretionary trust in her favour."

It seems to me that the conclusion come to in that case is in all respects in accord with the view which I have ventured to take of the meaning of this clause. What the learned judge determined was precisely what I have determined—namely, the time at which the destination of any instalment of income was to be determined was the moment at which that instalment either became due or was in the hands of

(1) [1896] 1 Ch. 630.

TOMLIN J. 1925 CLARK, *In re.* CLARK *v.* CLARK.

the trustees, and he further held that in that case the garnishee order affecting the money in the hands of the trustees had come at a period of time too late to create a forfeiture; in other words, the money was at home, and no question of forfeiture could arise after it was at home. That is the effect of the decision. There is nothing in the decision which is otherwise than consistent with the conclusion at which I have arrived in the present case. But it is said there are some expressions of the learned judge admittedly obiter, which indicate that in this case I ought to take another view. If I were satisfied that Stirling J. had expressed a view which was inconsistent with the conclusion at which I have arrived, I should certainly not arrive at that conclusion except after the most anxious consideration of anything which he had said. The learned judge says this (1): "The trusts . . . . are to me novel in form. . . . . They are not, perhaps, altogether happily expressed; but the object of the testator appears to be that a vested right or interest should not arise in the income except as it accrued due—i.e., such right or interest was not to arise as to any portion of the income until (at the earliest) such portion either accrued due or came to the hands of the trustees, and then only as to such portion. When some portion of the income accrues due or comes to the trustees' hands, the testator directs this portion to be dealt with in one of two ways, according as the son has or has not done or suffered an act which would prevent his personal enjoyment of it." That seems to me to be in accord with the view which I myself have taken of the clause, and I may observe that the learned judge uses the phrase "that a vested right or interest should not arise in the income except as it accrued due." If I am to give a literal interpretation to the language of the learned judge, I think that the phrase "vested right or interest" necessarily implies that until it is vested, it is contingent, and that that is in fact what he means, that the right or interest does not become vested until the income has accrued due and the events have happened which determine in which

(1) [1896] 1 Ch. 634.

of two directions the income is to go. But it is said that there is a later passage which is inconsistent with that, where the learned judge, after referring to the cases connected with restraint on anticipation and the question at what period the fund is affected by the restraint, says (1): "This, however, is not a case of the rights of married women for whose benefit the restraint on anticipation was devised, nor is it in strictness one in which anticipation or alienation is restrained: the question rather is whether the son ought to be treated as having acquired any title to any portion of the income until it has actually reached his hands: or whether a right to income vests in him at an earlier date."

That sentence read in vacuo may be no doubt used to support the view that there is no title, contingent or vested, until the income has actually reached his hands, but I think it is plain, reading the judgment as a whole, that the learned judge there is using the word "title" in the sense of that indefeasible title which arises only on the happening of a particular event. I think I am bound to read this passage in relation to its context, and read in relation to the earlier passage to which I have referred, it leaves no doubt in my mind as to the meaning of the learned judge. That meaning seems to me to be consistent, or, at any rate, not inconsistent with what I have said. I do not think there is anything in the case, either by decision or by statement obiter, which prevents me from reaching the conclusion at which I arrive, or which ought to induce me to hesitate in doing so.

I therefore hold that on the true construction of the will and in the events which have happened there has, up to date at any rate, been a forfeiture, and that so long as the bankruptcy continues in respect of each instalment that forfeiture will remain operative.

Solicitors: *Collyer-Bristow & Co., for Hearfield & Lambert, Hull; Jaques & Co.; Bell, Brodrick & Gray.*

(1) [1896] 1 Ch. 635.

P. J. B.

[1948] Ch. 747

TOMLIN J.
1926
April 16, 19.

In re WILKINSON.

PAGE *v.* PUBLIC TRUSTEE.

[1926. W. 204.]

Will—Construction—Bequest until Legatee "voluntarily" ceases to make a named House her permanent Home—Legatee a married Woman—Husband's Desire to reside Elsewhere—Effect of Compliance by Legatee with his Injunction.

By her will dated in 1913 a testatrix gave her dwelling-house to her niece, and she also bequeathed to trustees the sum of 7000*l.* upon trust for investment, and to pay the income to her said niece "(in order to enable her to reside in the dwelling-house . . . .) for and during the term of her natural life or until she shall voluntarily cease to make the said dwelling-house her permanent home without power of anticipation and after her death" the testatrix directed her trustees to hold this sum and the investments representing it in trust for such person or persons for such purposes and in such manner as her niece should by deed or will appoint and in default as part of the testatrix's residuary estate, "Provided however that in the event of my said niece voluntarily ceasing to make the said dwelling-house her permanent home as aforesaid, I direct that the said sum of 7000*l.* and the investments representing the same shall fall into residue":—

Held (1.), that the gift was to the niece for her life or until she voluntarily ceased to make the dwelling-house her permanent home (whichever first happened), and that the provision against ceasing to make the house her home was not a condition subsequent.

(2.) That the gift was not invalid either as being contrary to public policy or as being too uncertain.

(3.) That if the niece, being a married woman, ceased to make the house her permanent home in pursuance of her husband's injunction and because he wished to make another house the matrimonial home, the legacy would not determine. In such a case she would not cease to use the house as her permanent home "voluntarily," but in pursuance of her legal duty to her husband.

ADJOURNED SUMMONS.

By her will dated July 4, 1913, Mary Wilkinson, after appointing executors and trustees, by clause 3 devised and bequeathed the dwelling-house in which she was residing in North Walsham, Norfolk, with the furniture, linen, china and indoor and outdoor effects in and about the same to her niece Edith Carter absolutely, expressing the wish (but without imposing any legal liability) that, as the dwelling-house had

been in her family for more than eighty years, her niece should adopt and use the surname of "Wilkinson." After making a number of specific and pecuniary bequests the testatrix devised and bequeathed all her residuary real and personal estate to her trustees upon trust for sale calling in and conversion and out of the money to arise from such sale calling in and conversion, to pay her funeral and testamentary expenses and debts and legacies and the duties thereinmentioned and then to set aside three sums, of which the third was a sum of 7000*l.* The trusts with regard to this sum which were contained in clause 9 were as follows: "In the third place I direct that my trustees shall set aside the sum of 7000*l.* and invest the same in any of the investments hereinafter authorized to pay the income arising therefrom to my said niece Edith Carter (in order to enable her to reside in the dwelling-house in North Walsham now occupied by me and by this my will devised to my said niece) for and during the term of her natural life or until she shall voluntarily cease to make the said dwelling-house her permanent home without power of anticipation and after her death I direct that my trustees shall hold the sum of 7000*l.* and the investments representing the same in trust for such person or persons for such purposes and in such manner as my said niece Edith Carter shall from time to time by any deed or deeds revocable or irrevocable or by will or codicil appoint and in default of such appointment or so far as any such appointment shall not extend the said sum of 7000*l.* and the investments representing the sum shall fall into and form part of my residuary estate. Provided however that in the event of my said niece voluntarily ceasing to make the said dwelling-house her permanent home as aforesaid I direct that the said sum of 7000*l.* and the investments representing the same shall fall into and form part of my residuary estate." The will subsequently contained trusts of the residuary estate. There were two codicils to the testatrix's will dated December 10, 1913, and May 1, 1914, but they did not affect the trusts of the dwelling-house or of the sum of 7000*l.* so far as Edith Carter's interest was concerned.

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The testatrix died on July 20, 1914, and Edith Carter, who was then a spinster, took up her permanent residence at the testatrix's dwelling-house at North Walsham, which was called the Lower House. On January 20, 1923, Edith Carter intermarried with Cecil Herbert Winter Page, and on their marriage her husband went to reside with her at Lower House. In an affidavit by Mrs. Page she stated that her husband had a house in a much healthier part of North Walsham, and that he was pressing her to go and live with him at his house; that she was anxious to comply with his wishes, but desired to know whether, if she did so, she would forfeit her life interest and power of appointment over the sum of 7000*l.*

This summons was accordingly taken out by Mrs. Page to have this question determined.

Luxmoore K.C. and *Roxburgh* for the plaintiff. The gift to the plaintiff of the income of the sum of 7000*l.* is subject to a condition subsequent under which her life interest ceases if she voluntarily ceases to make Lower House her permanent home. This condition is void, as tending to produce separation between husband and wife in breach of the wife's duty: *Mitchel* v. *Reynolds* (1); *Wilkinson* v. *Wilkinson* (2); *Cartwright* v. *Cartwright* (3); *Wren* v. *Bradley* (4); *Morley* v. *Rennoldson.* (5) It is the duty of a wife to live where her husband desires, and the result of the condition in this case is to make her duty and interest conflict.

[TOMLIN J. In the cases cited the invalid provisions necessarily tended to produce a result contrary to the policy of law. That was not the necessary effect in this case.]

It is in the events which have happened, and the condition is bad, because it might have this effect, and being a void condition subsequent can be disregarded: *Partridge* v. *Partridge* (6); *In re Boulter.* (7)

[TOMLIN J. referred to *In re Hewett.* (8)]

(1) (1711) 1 P. Wms. 181, 189.
(2) (1871) L. R. 12 Eq. 604.
(3) (1853) 3 D. M. & G. 982.
(4) (1848) 2 De G. & Sm. 49.
(5) (1843) 2 Hare, 570.
(6) [1894] 1 Ch. 351, 358.
(7) [1922] 1 Ch. 75.
(8) [1918] 1 Ch. 458.

A condition tending to make a wife live separately from her husband is void, whatever the motive of the testator in imposing it, as being contrary to public policy.

Alternatively this condition is void for uncertainty: *Fillingham* v. *Bromley*. (1) How can the Court fix the conditions that will constitute a cesser to reside permanently? But even if the condition is not void on either of these grounds, the further question arises whether the plaintiff would be committing a breach of it, if, in pursuance of her husband's requirements, she went to reside in another house. A wife is under a legal duty to reside with her husband: Halsbury's Laws of England, vol. xvi., p. 318; and if for the purpose of complying with this duty the plaintiff ceased to make Lower House her permanent home, she would not be doing so "voluntarily": see *Attorney-General* v. *Ellis* (2), where "voluntarily" is defined as meaning "freely, without compulsion" and "not under any obligation." A wife acting in pursuance of her legal duty does not act voluntarily.

Stamp for the trustees.

Spens K.C. and *Errington* for persons interested in residue. The provision in question is not a condition subsequent, but part of the limitation of the gift and, if void, the whole gift goes: *In re Moore*. (3) It is a bequest to the plaintiff for her life or until she ceases voluntarily to make the house her permanent home (whichever first happens). However, such a gift when made by way of limitation is valid, whatever the position might be if the provision as to residence was a condition subsequent: *Heath* v. *Lewis* (4); *In re Trenchard* (5); *In re Lovell*. (6) Further, there is no justification for the contention that the gift is void for uncertainty. Lastly, if the wife ceases to use the house as her permanent home because her husband wishes to reside elsewhere, she will be doing so "voluntarily." "Voluntarily" is used as an antithesis to "under compulson" and not as an antithesis to

(1) (1823) T. & R. 530, 534.
(2) [1895] 2 Q. B. 466, 470.
(3) (1888) 39 Ch. D. 116.
(4) (1853) 3 D. M. & G. 954.
(5) [1902] 1 Ch. 378.
(6) [1920] 1 Ch. 122.

TOMLIN J. "in performance of a duty": *Overseers, &c., of the Savoy* v. *Art Union of London.* (1)

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TOMLIN J. In this case it falls on me to determine the construction of certain provisions in the will of a testatrix who died on July 20, 1914. [His Lordship then read the material part of the will of the testatrix.] The testatrix having died in 1914, the niece, Edith Carter, went to live in the house, which had been given to her absolutely, and she lived there as a spinster for some time—some nine years, I think; but on January 20, 1923, she married her present husband, Dr. Page, a medical practitioner at North Walsham. Dr. Page has a house of his own in North Walsham, and it is said that that house is situate in a more salubrious spot than the house in which Mrs. Page lives. However, since the marriage in January, 1923, Dr. and Mrs. Page have lived in Mrs. Page's house, the house devised by the testatrix. But it is said that Dr. Page desires that the matrimonial home should be constituted in his own house, and not in the house of Mrs. Page, and that he has requested her to leave the house devised to her by the testatrix and to come and live with him at his own house and establish the matrimonial home in that house.

In those circumstances, the question has arisen as to what is the effect of the provisions of the will with regard to the bequest of 7000*l.*; whether, if Mrs. Page accedes to her husband's injunction, and goes to live with him in his own house, she will thereby forfeit all the interest which she has in the income of the 7000*l.* and her power of appointing it after her death. It is said by Mrs. Page that on the true construction of the clause in the will dealing with the bequest of 7000*l.*, there is a gift which is cut down by a subsequent condition, and that this subsequent condition is void either as being contrary to public policy, because it tends in restraint of marriage, or as being too uncertain, and that, in those circumstances, the gift goes to her free from the conditions; and she further says that, even if she is wrong in that regard still, the leaving of her home at the instance of her husband,

(1) [1896] A. C. 296, 307.

in order to comply with her legal duty of living with him at that spot which he elects as the matrimonial home, is not a voluntary ceasing to make the testatrix's house in North Walsham her home.

The first question which I have to determine is, whether on the true construction of the gift it is made to her by way of limitation until the happening of certain events, or is made to her for her life, but subject to a condition subsequent determining it on the happening of the same events. I think it is plain that the gift is in the form of a limitation, and that a limitation until the happening of some event, which if it were expressed in the form of a condition subsequent might be bad as being in restraint of marriage, will not be bad. Of course a question may always arise in cases of this kind whether the whole gift is bad as being against public policy. Thus in *In re Moore* (1) there was a gift which was held to be bad, because it tended to produce future separation between the spouses. On the other hand, if, on its true construction, a gift is not in the form of a limitation until the happening of an event, but is a gift subject to a condition subsequent, which would operate to cut the gift down upon the happening of the event, then if the condition is bad on the ground of public policy, the condition goes and the gift stands unaffected by it.

I have had cited to me a large number of cases upon this topic, and I think what I have stated correctly summarizes their effect up to a point. But as regards the cases relating to conditions subsequent, it is not clear whether the form of gift is conclusive when the event is one which tends to some result contrary to public policy, or whether the Court is entitled to examine into the intention of the testator as shown by the language employed and the surrounding circumstances and determine whether or not his purpose in prescribing the condition was to produce an illegal result and to decide as to its validity or invalidity according to what was the intention. There is some obscurity in the authorities on this point. It may be that the true view is

(1) 39 Ch. D. 116.

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that you are entitled to examine into the question of intention, a view accurately and fully expressed in *In re Hewett* (1), which came before Younger J., or it may be that that case goes somewhat beyond the earlier authorities, that it must not be read too literally, and that you are not entitled to examine in the way there suggested into the intention of the testator. Having regard, however, to the conclusion which I am about to express with regard to the construction of this will, I think it is unnecessary for me to determine that interesting question.

When I come to examine the language of this will, I am satisfied that I am not dealing with a case of a gift cut down by a condition subsequent, but that I am dealing with a case of limitation. The language of the gift is " pay the income . . . . to my niece . . . . (in order to enable her to reside . . . .) for and during the term of her natural life or until she shall voluntarily cease to make the . . . . dwelling-house her permanent home." If the clause had paused there, I feel great difficulty in appreciating what argument could have been addressed to me to suggest that that was other than a limitation similar to the ordinary limitation to a woman for life, or until she shall marry again. But it is said, and said truly, that in construing these words, I must read the clause as a whole. And it is contended that when I go on to find the direction that after her death the trustees shall hold the sum of 7000*l.* in trust as she shall appoint, and that in default of appointment this sum shall fall into residue followed by the proviso " Provided however that in the event of my said niece voluntarily ceasing to make the said dwelling-house her permanent home as aforesaid I direct that the said sum of 7000*l.* and the investments representing the same shall fall into " residue, I must in some way modify my view of the earlier language, and read it as though it were a gift to her for life, with a condition subsequent that her interest shall cease if at any time she voluntarily ceases to make the dwelling-house her permanent home.

I am unable to follow that argument. The scheme of the

(1) [1918] 1 Ch. 458.

clause seems to me to be reasonably plain. There is, first of all, a limitation of the income to her for life, or until the happening of the named event. The next branch of the clause, as I read it, deals with the alternative, of her death without having ceased to occupy the house, and then the proviso deals with the other alternative of her ceasing to reside in the house. The words "provided however" seem to me to mean nothing more than "but in the other alternative." The matter, it seems to me, would have been beyond argument if after the words "after her death" there had been inserted "should she continue during her life to make it her permanent home," and the fact that those words do not occur are not, in my judgment, sufficient to alter the whole frame of the clause. I think this conclusion is most in accord with the natural meaning of the words and with that which is, so far as one can judge from the words, contemplated by the testatrix.

Having arrived at that result, the only remaining question is: (1.) whether the alternative event specified is too uncertain to be ascertained and, if so, whether that affects the validity of the gift to her for life, and (2.) whether, assuming that there is no uncertainty, an event will happen in certain hypothetical circumstances which will determine the interest?

I confess I do not feel any difficulty in giving a rational meaning to the words "to make the dwelling-house her permanent home"; I think it is reasonably plain what that means; it seems to me it means, to keep it up as what may be colloquially called her headquarters. I do not think there is any particular difficulty in attaching a reasonable meaning to the phrase. I do not propose, and I do not think it necessary for me to-day to define precisely what I understand the phrase to mean. I am satisfied that it bears a sufficiently definite meaning to enable me to say that there is no case of uncertainty which renders the gift in any way bad, or defective. The fact that the language of the will is not uncertain has, of course, no necessary bearing upon the question whether when particular events have happened

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there may not be some difficulty in saying whether or not they fall within that which is contemplated by the will; but that is not a matter with which I have anything to do. That leaves only one other point—namely, whether the contemplated event will have happened upon the hypothetical events occurring, for the lady has done nothing up to date in respect of which it could be alleged that her interest had ceased. But she and her husband are contemplating a change of the matrimonial home, for the reasons which have been indicated in the affidavits that have been filed in the case.

I am not going to give any decision which will prejudice the position in the event of anything happening which may fairly give rise to the suggestion that the interest has determined. The only point that I am going to determine is whether upon the assumption that the husband elects to change the matrimonial home and requires his wife to accompany him to the place that he selects as the matrimonial home and that she complies with the instructions of her husband in that regard, she will have voluntarily ceased to make the present house her home.

"Voluntarily" means, obviously, the doing of something as the result of the free exercise of the will. In *Attorney-General* v. *Ellis* (1), which was a revenue case, Lord Russell, when dealing with the meaning of "voluntarily" in connection with a voluntary transfer, said: "We are, however, of opinion that in the section under consideration the word 'voluntarily' is not used in the sense of 'without consideration,' but in its ordinary sense of 'freely, without compulsion,' and 'not under any obligation.'" So, too, I think in this will the phrase is used to refer to an act done as the result of the exercise of the lady's own free will, in circumstances in which there is nothing in the nature of a legal duty or obligation requiring her to take a particular course.

The duty of a wife, in law, is a duty, as stated in Halsbury's Laws of England, vol. xvi., p. 318, "to reside and cohabit with her husband." It may be that, from a juristic point

(1) [1895] 2 Q. B. 466, 470.

of view, that duty is of imperfect obligation, but, at any rate, it is capable, up to a point, of enforcement by means of an action, or suit for restitution of conjugal rights. The question is, whether, if the wife in compliance with her legal duty, but without compulsion by proceedings of the nature which I have indicated, joins the husband in the new matrimonial home as the result of his direction to her to do so, she will have voluntarily ceased to reside in this house. In my opinion, she will not. In my view, when she leaves the house in order to comply with a legal duty, she cannot be said to have ceased to make the dwelling-house her permanent home voluntarily, and, if that is so, then the mere fact that she complies with the injunctions of her husband in this regard will not injure her interest in the 7000*l.*

I desire to confine my decision strictly to the hypothesis upon which it is based; and I am expressing no opinion at all whether there may not be some change of circumstances which would affect the result. All that I leave absolutely at large, and unprejudiced, and any of the parties are free whenever they think there are circumstances which justify any further application to the Court in the matter, to come and have them determined without suffering prejudice by my present decision.

I propose to make a declaration to the effect that I have indicated; and the costs of the summons must come out of residue.

Solicitors: *Gadsden & Co.; Cunliffe, Blake & Mossman; Collyer-Bristow & Co.*

H. C. G.

TOMLIN J. 1926 June 2.

In re LEIGH'S SETTLED ESTATES. (1)

[1926. L. 412.]

Settlement—Trustees for Sale subject to Jointure Rentcharge—Compound Settlement—Person having Powers of Tenant for Life—Effect of Order under Settled Land Act, 1884 (47 & 48 *Vict. c.* 18), *s.* 7—*Settled Land Act*, 1925 (15 *Geo.* 5, *c.* 18), *ss.* 1, 19, 20, 117, *Sch. II., para.* 1—*Law of Property Act*, 1925 (15 *Geo.* 5, *c.* 20), *s.* 29, *sub-s.* 4; *s.* 205, *sub-s.* 1 (*xxix.*).

Land is not "subject to an immediate binding trust for sale" within the meaning of the Settled Land Act, 1925, s. 20, sub-s. 1 (viii.), unless the trust for sale is exercisable so as to overreach all prior equitable charges, with the result that the whole subject matter of the settlement is subject to the trust for sale.

Under a testator's will Mrs. T. became entitled as tenant in tail of the settled land subject only to a jointure rentcharge of 1500*l.* appointed by a deceased tenant for life to his widow under a power in the will. In 1923 Mrs. T. disentailed, and by a conveyance conveyed the settled land (subject to the jointure) to trustees upon trust for sale (with power to postpone) and to stand possessed of the net proceeds of sale and the rents and profits until sale upon the trusts of a settlement of even date. Under this settlement the income of the proceeds of sale and the rents and profits until sale were applicable in paying life annuities of 5000*l.* to Mrs. T., 1000*l.* to her husband, 3500*l.* to the jointress, and in paying the balance to Mrs. T. during her life. In 1924 and 1925 two orders were made under the Settled Land Act, 1884, s. 7, which together gave Mrs. T. power to exercise all the powers of a tenant for life under the Settled Land Acts, 1884 to 1890:—

Held, (1.) that the settled land was subject to a compound settlement consisting of the will, the disentailing deed, the conveyance and the settlement, and that Mrs. T. had the powers of a tenant for life of the compound settlement conferred on her by the Settled Land Act, 1925, s. 20, sub-s. 1 (viii.), as the land was not "subject to an immediate binding trust for sale," and was entitled to have a vesting deed executed in her favour pursuant to Sch. II., para. 1;

(2.) that on the falling in of the jointure Mrs. T. would by virtue of s. 29, sub-s. 4, of the Law of Property Act, 1925, become entitled to exercise the powers conferred by the orders made under the Settled Land Act, 1884, s. 7, but must exercise them in the names and on behalf of the trustees for sale.

ADJOURNED SUMMONS.

By his will dated May 22, 1860, Capel Hanbury Leigh, a

(1) This case was decided before the passing of the Law of Property (Amendment) Act, 1926, which contains in the Schedule an amendment of the Law of Property Act, 1925, s. 2, sub-s. 2, enabling trustees for sale (if they or their predecessors in title have been approved or appointed by the Court or if they consist of a trust corporation) to overreach any prior equitable interest or power.

testator who died on September 28, 1861, devised his freehold estates in the counties of Monmouth, Glamorgan, and Brecon and elsewhere (subject to a prior limitation of a term of 1000 years upon trusts long since satisfied), to the use of his son, John Capel Hanbury Leigh, during his life with remainder to his said son's first and every other son successively in tail general with remainder to his said son's first and every other daughter successively in tail general with divers remainders over. The testator gave power to any tenant for life in possession to appoint to his widow a jointure rentcharge not exceeding 1500*l.* per annum, issuing out of and charged upon the settled lands. John Capel Hanbury Leigh (afterwards John Capel Hanbury) survived the testator, and on January 7, 1885, appointed to his wife, Mrs. Hanbury, for her life, and if she survived him, a yearly rentcharge of 1500*l.* to be charged upon all the settled lands.

John Capel Hanbury had two children—namely, a son, who died on August 9, 1908, at the age of fourteen years, and the respondent, Ruth Julia Margarette Tenison (hereafter called Mrs. Tenison), who was born on February 16, 1903, and intermarried with the respondent Gerald Eric Farquhar Tenison (hereafter called Mr. Tenison) on December 18, 1923.

By an order of the Chancery Division made on December 3, 1923, the Court had approved the marriage and authorized the execution by Mrs. Tenison (although a minor) of the three deeds next mentioned. On December 17, 1923, Mrs. Tenison, being then still unmarried, executed a disentailing assurance as the result of which she became entitled in fee simple to the settled lands, subject only to the yearly rentcharge of 1500*l.* Then by a conveyance of the same date she conveyed the settled lands unto and to the use of the trustees, who (by clause 4) were to hold the same upon trust for sale but with power to postpone sale, and so that during Mrs. Tenison's life any sale should be made only with her consent. In the same deed Mrs. Hanbury covenanted with the trustees that if on or in connection with any sale under the trust for sale they should desire her to concur therein and to execute any deed for the

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purpose of releasing the property from her jointure rentcharge, she would do so at their cost, but only upon the terms that her jointure rentcharge should attach and become charged on the proceeds of sale and the investments for the time being representing the same. By clause 5 it was provided that the trustees should hold the net proceeds of any sale under the trust for sale and also the rents and profits until sale upon the trusts and subject to the powers and provisions declared by a deed of settlement of even date. By this deed of settlement it was declared that the trustees should stand possessed of the net money to arise from any sale made under the trust for sale contained in the conveyance of even date upon trust for investment and to apply the trust fund so created first, in paying to Mrs. Tenison during her life, without power of anticipation, a net yearly sum of 5000*l.*, secondly, in paying to Mr. Tenison a net yearly sum of 1000*l.*, thirdly, in paying to Mrs. Hanbury a net yearly sum of 3500*l.*, and fourthly, in paying the remainder of the income to Mrs. Tenison during her life without power of anticipation. After the death of Mrs. Tenison, and subject to the annuities of Mr. Tenison and Mrs. Hanbury, the trustees were directed to hold the trust fund upon trusts for the benefit of Mr. and Mrs. Tenison's issue. Pending the sale of the property comprised in the conveyance of even date, the net rents and profits were to be applied upon the same trusts as were declared concerning the income of money arising from sales under the trust for sale.

By an order of the Chancery Division made by Tomlin J. on April 15, 1924, in the matter of the compound settlement created by the testator's will, the disentailing deed, the conveyance and the settlement, it was ordered that Mrs. Tenison should be let into possession and receipt of the rents and profits of the settled lands, and trustees of the compound settlement were appointed. It was further ordered, pursuant to the Settled Land Act, 1884, s. 7, that the powers conferred upon a tenant for life by ss. 6 to 13 of the Settled Land Act, 1882, should be exercisable by Mrs. Tenison. By a further order of Tomlin J. on January 20, 1925, it was

ordered, pursuant to the same section, that the power of sale and other powers conferred on a tenant for life by the Settled Land Acts, 1882 to 1890, should also be exercisable by Mrs. Tenison.

The trustees of the compound settlement, who were also the trustees for sale under the conveyance, took out this summons to have it determined :—

(1.) Who was the person in whose favour a vesting deed ought to be executed for giving effect to the settlement of the settled lands subsisting at the commencement of the Settled Land Act, 1925, and who were the trustees of such settlement who should execute such vesting deed.

(2.) Whether the orders of April 15, 1924, and January 20, 1925, were still in force within the meaning of s. 29, sub-s. 4, of the Law of Property Act, 1925, and whether Mrs. Tenison could under that sub-section now exercise the powers conferred on a tenant for life by the Settled Land Act, 1925, in the names and on behalf of the trustees ; or whether, the trustees not being trustees for sale under the compound settlement, the powers by the Settled Land Act, 1925, conferred upon a tenant for life in possession of settled land were now exercisable by the present trustees of the testator's will to the exclusion of Mrs. Tenison.

H. T. Methold for the trustees.

Gavin Simonds K.C. and *Tillard* for Mrs. Tenison. The land is subject to a settlement under the Settled Land Act, 1925, s. 1, sub-s. 1 (v.), and Mrs. Tenison is a person having the powers of a tenant for life under s. 20, sub-s. 1 (viii.), unless it can be said that "the land is subject to an immediate binding trust for sale." That is the position apart from the orders made under the Settled Land Act, 1884, and the question arises how far those orders affect the position. The orders' validity is expressly preserved by s. 118, but they have to be given effect to as provided by s. 29, sub-s. 4, of the Law of Property Act, 1925. It seems clear that as soon as the annuitant dies Mrs. Tenison will be entitled to exercise the powers conferred by the two orders, but in the names of

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the trustees. The question arises what is the effect of those orders while Mrs. Hanbury's equitable interest continues. It is suggested that as those orders were made in the matter of the compound settlement she is entitled now to exercise the powers of a tenant for life under them.

[TOMLIN J. The orders made under s. 7 of the Act of 1884 were made to remove the check that had been imposed on her exercise of the powers conferred by s. 63 of the Act of 1882. The power to overreach the prior equitable interest must surely arise by virtue of her powers as tenant for life under the compound settlement ?]

The orders were made in the matter of the compound settlement and of the conveyance upon trust for sale.

In any case Mrs. Tenison has the powers of a tenant for life under the compound settlement by virtue of the Settled Land Act, 1925, s. 20, sub-s. 1 (viii.). There is not here " an immediate binding trust for sale." By the Settled Land Act, 1925, s. 117, sub-s. 1 (xxx.), trust for sale has in that Act the same meaning as in the Law of Property Act, 1925, where it is defined in s. 205, sub-s. 1 (xxix.), to mean " an immediate binding trust for sale, whether or not exercisable at the request or with the consent of any person, and with or without a power at discretion to postpone the sale." Having regard to this definition, it is submitted that if " binding " is to be given any meaning at all, it must refer to a trust for sale which binds all the equitable interests. If so, there is not here " an immediate binding trust for sale," and s. 20, sub-s. 1 (viii.), applies. The Law of Property (Amendment) Bill now before Parliament amends s. 1 of the Settled Land Act, 1925, by providing that this section is not to apply to land held on trust for sale. But even if this amendment becomes law, it will not affect the position here if " trust for sale " has the meaning suggested. The vesting provisions in the Law of Property Act, 1925, First Schedule, Part II., para. 6, show that land is contemplated as being either settled land or land held upon trust for sale, but that it cannot be both at the same time. Here the land is, it is submitted, clearly settled land, and Mrs. Tenison a person having the powers of

a tenant for life. If so, a vesting deed must be executed in her favour under the Settled Land Act, 1925, Second Schedule, para. 1, containing the matters laid down in s. 5. It is to be made in favour of a tenant for life or statutory owner, and "tenant for life" includes by s. 117, sub-s. 1 (xxviii.), a person having the powers of a tenant for life.

J. V. Nesbitt for Mrs. Hanbury, Mr. Tenison, and a trustee of the testator's will. It is not denied that by virtue of the Law of Property Act, 1925, the orders made under s. 7 of the Settled Land Act, 1884, are still valid.

[TOMLIN J. Apart from the orders made under the Settled Land Act, 1884, how is it suggested that the Settled Land Act, 1925, applies ?]

There is in that case no person having the powers of a tenant for life, and the trustees will therefore exercise them as statutory owners : see ss. 23 and 117, sub-s. 1 (xxvi.). Sect. 20, sub-s. 1 (viii.), is not applicable. It is substantially in the same terms as the Settled Land Act, 1882, s. 58, sub-s. 1 (ix.), except for the addition of the words "unless the land is subject to an immediate binding trust for sale," and it was never suggested that a person interested for life under a trust for sale came within that provision. In the new Act the Legislature, in order to make it quite clear that s. 20, sub-s. 1 (viii.), is not to apply in such a case, have added these words. An "immediate binding trust for sale" means the same thing as "immediate trust for sale." "Immediate binding" is used for "immediately binding" in antithesis to a future trust for sale. If so, there is no person having the powers of a tenant for life, and the trustees will exercise those powers as statutory owners. The orders made under s. 7 of the Settled Land Act, 1884, will become available on the falling in of Mrs. Hanbury's annuity under the will.

TOMLIN J. In this case land, I will not say is settled, because I hesitate to use a phrase which may not mean what I think it means, but is the subject matter of a number of instruments. [His Lordship then stated the facts and continued :] That was the condition of affairs when certain

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new Acts came into force on January 1. The two Acts to which it is necessary to refer are the Law of Property Act, 1925, and the Settled Land Act, 1925. The Settled Land Act, 1925, provides by s. 1 what constitutes a settlement, and it seems plain from the language employed in sub-s. 1 that the testator's will, the disentailing deed, the conveyance on trust for sale and the settlement of the proceeds of sale, which together cover the legal estate in the unencumbered fee simple of the land, constitute a settlement within the meaning of that section, more especially as there is a proviso that where land is the subject of a compound settlement references in this Act to the settlement shall be construed as meaning such compound settlement, unless the context otherwise requires. Under that Act, s. 19 provides that "the person of full age who is for the time being beneficially entitled under a settlement to possession of settled land for his life is for the purposes of this Act the tenant for life of that land and the tenant for life under that settlement." Sect. 20 deals with other limited owners having the powers of the tenant for life and provides: "Each of the following persons being of full age shall, when his estate or interest is in possession, have the powers of a tenant for life under this Act, namely, ... (viii.) A person entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life, whether or not subject to expenses of management or to a trust for accumulation of income for any purpose, or until sale of the land, or until forfeiture, cesser or determination by any means of his interest therein, unless the land is subject to an immediate binding trust for sale." Now under s. 117 (xxx.), under "trust corporation," it is discoverable that "trust for sale," "trustees for sale," and "power to postpone a sale" have the same meanings as in the Law of Property Act, 1925. The reference in the Law of Property Act, 1925, brings in the definition of trust for sale in s. 205, sub-s. 1 (xxix.), which is in these terms: "'Trust for sale,' in relation to land, means an immediate binding trust for sale, whether or not exercisable at the request or with the consent

of any person, and with or without a power at discretion to postpone the sale." So that I suppose in s. 20, sub-s. 1 (viii.), of the Settled Land Act, 1925, "unless the land is subject to an immediate binding trust for sale" must mean unless the land is subject to such a trust for sale as is defined by s. 205, sub-s. 1 (xxix.), of the Law of Property Act, 1925.

The question is what is meant by "an immediate binding trust for sale." Of course an immediate trust for sale is an intelligible conception where immediate is used as distinct from future; a binding trust for sale in its simplest form would be something the opposite of one that was not binding, but it is difficult to suppose that this is the contrast which was intended to be indicated by the use of this phrase. There must be, it seems to me, some significance in the word "binding" here. It is incredible that the word should have no meaning. It has presumably been inserted for some definite purpose, and it is the duty of the Court to attribute to it some intelligible meaning. The expression "unless the land is subject to an immediate binding trust for sale" must I think mean unless the land that is the total subject matter of the settlement is subject to a trust for sale which operates in relation to the whole subject matter of the settlement and is immediately exercisable, although possibly with the limitation, that it is treated as immediately exercisable "whether or not exercisable at the request or with the consent of any person and with or without a power at discretion to postpone the sale." If that be the meaning of the phrase it may well be that, where the subject matter of the settlement is the whole unencumbered fee simple, there is no immediate binding trust for sale so long as there is not a trust for sale which is capable of overriding all charges having under the settlement priority to the trust for sale. In the present case there is no trust for sale capable of overriding all prior charges. The trust for sale under the conveyance of December, 1923, is not capable of overriding the annuity which arose under the will of 1860. It is true that the annuitant entered into a special contract with the trustees of that conveyance that in connection with any sale under

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the trust for sale she would, if desired, concur to release her annuity, but the trust for sale itself is not a trust for sale which overrides that annuity.

If the view I have suggested be correct, then in considering whether under the settlement created by the four instruments in question there is within the meaning of the Settled Land Act, 1925, a tenant for life, I am able to apply s. 20, sub-s. 1 (viii.), to this case, as being a case where there is no immediate binding trust for sale. The question then is whether Mrs. Tenison, who is entitled to receive, as things stand, the rents of the property until sale, subject only to paying certain annuities, is within sub-cl. viii. and is therefore a person having the powers of a tenant for life under the Act. It makes, I think, no difference that her right to receive the rent is subject to certain prior charges. I see no reason to think that in that respect this sub-section differs from s. 58, sub-s. 1 (ix.), of the old Act of 1882, and I think therefore that if the case is not a case where there is an immediate binding trust for sale she comes within the language of this particular sub-clause.

It follows that, having held upon the construction of the phrase "immediate binding trust for sale" that there is no immediate binding trust for sale, I must come also to the conclusion that Mrs. Tenison is a person having the powers of a tenant for life and, as such, prima facie the person in whom the legal estate should be vested by a vesting deed made pursuant to the provision in para. 1 of the Second Schedule to the Settled Land Act, 1925, headed "Provisions for vesting legal estate in tenant for life or statutory owner." I say prima facie, because it has been suggested that some other consequence may result from the fact that before these Acts came into force I had made an order giving Mrs. Tenison leave to exercise the powers of a tenant for life under s. 7 of the Act of 1884. I have come, however, to the conclusion that for the moment the existence of that order does not in any way affect—and indeed I do not see how it could affect—the conclusion at which I have arrived in regard to the effect of the new Acts apart from those orders. Moreover,

while it is true that under the old Act of 1882, s. 58, sub-s. 1 (ix.), seems to have been treated as inapplicable to the case of a person entitled to rents and profits pending a sale under a trust for sale, the considerations which arise here by reason of the phrase "an immediate binding trust for sale" did not enter into the matter; and the problem to be solved under s. 20, sub-s. 1 (viii.), of the Settled Land Act, 1925, is altogether different. It is necessary to bear that in mind, and also that under s. 63 of the Act of 1882 where there was a trust for sale the person entitled to the income of the proceeds of sale or the rents of the land until sale was the person to exercise the powers of the Settled Land Act, and that it was only at a later date, when it was found that there would result from that condition of affairs a conflict between the powers of the tenant for life and those of the trustees, that s. 7 of the Act of 1884 was passed, whereby the tenant for life's powers were only to be exercised with the consent of the Court. Bearing those matters in mind, it is plain that the effect of the order made by me before the new Acts came into force was merely to sanction the exercise by the tenant for life of those powers which under s. 63 she would have been entitled to exercise but for the prohibition contained in the Act of 1884. It may be true that, having had that permission, the tenant for life could, under the old law, as soon as there were trustees appointed of the compound settlement, exercise her powers so as to override the prior charges, and that the powers that she then exercised were the powers which she had obtained leave to exercise, and not some higher power vested in her as tenant for life of the compound settlement. Or the true view may be that she could only sell so as to override the prior charges by virtue of the higher powers vested in her as tenant for life of the compound settlement. I do not think it is necessary for me to decide which is the right view in that regard. However that may be, it seems clear to me that on the true construction of the new Acts Mrs. Tenison is, as I have already held, a person having the powers of a tenant for life under a compound settlement, and is entitled to have the legal estate in the whole

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unencumbered fee simple of the land vested in her; but it may be that when the prior rentcharge falls so that the will ceases to have any operation, then a different position of affairs may arise, and that Mrs. Tenison may then be in the position contemplated by s. 29, sub-s. 4, of the Law of Property Act, 1925, and entitled to exercise the powers conferred on her by the orders made under the Settled Land Act, 1884, s. 7, in the names and on behalf of the trustees for sale. Sect. 29 is a remarkable section. Under the first sub-section the trustees for sale are authorized to delegate certain leasing and like powers, but not to delegate their trust for sale; sub-s. 2 provides that, "Any power so delegated shall be exercised only in the names and on behalf of the trustees delegating the power"; sub-s. 3 relieves persons delegating their powers from liability; sub-s. 4 provides as follows: "Where, at the commencement of this Act, an order made under s. 7 of the Settled Land Act, 1884, is in force, the person on whom any power is thereby conferred shall, while the order remains in force, exercise such power in the names and on behalf of the trustees for sale in like manner as if the power had been delegated to him under this section." Any power of sale, of course, could not have been delegated under this section, but I have already held in *In re Lady Francis Cecil's Settlement Trusts* (1) that sub-s. 4 includes such a power. I think the concluding words of the sub-section really mean "if the power had been a power capable of being delegated under this section and had been so delegated." Here the trustees have no power by virtue of their trust for sale to override the annuity or jointure; and it may be—I I do not know—that the position differs from that under the old law in that, if under the old law there were trustees of this compound settlement, the person having the powers of a tenant for life might have overriden the jointure upon any exercise of her powers under the leave conferred on her by the order. However, I am not concerned with that. I think that it is enough for me to say that if hereafter on the

(1) [1926] W. N. 138.

cesser of the existing compound settlement by reason of the falling of the annuity, the settlement then consists of the two instruments comprising the marriage settlement, then if the order made by me before the Act came into force is relied upon to enable the lady who receives the rents under those settlements to exercise the powers of the Act, I see no reason to think that that order will not be in force and a good order, although the power exercised under it must be exercised in the names of and on behalf of the trustees.

Solicitors: *Foyer, White, Borrett & Black.*

H. C. G.

BAELZ *v.* PUBLIC TRUSTEE.

[1923. B. 6122.]

Company—Shares—German National—Domicil of trading Corporation—Incorporation and registered Office in England—Administration of Business Abroad—"Property, rights, and interests" within His Majesty's Dominions—Statutory Charge—Treaty of Versailles, art. 297 (*b*)*—Treaty of Peace Order,* 1919, *s.* 1, *sub-s. xvi.*

A German national was beneficially entitled to certain shares in a trading corporation registered in England under the Companies Acts; the whole administration of the business of the company was conducted by directors domiciled and resident in Holland. The register of members was kept at the office in England. Dividends on these shares had been received by the Public Trustee as custodian of enemy property, and he claimed that this interest of the German national was subject to a charge under the Peace Treaty Act and Orders. In an action by the German national claiming a declaration that he was entitled to this property free from any charge on the ground that the domicil of the company was in Holland:—

Held, that on the facts the domicil of the company was in England, and the case was covered by *Attorney-General* v. *Higgins* (1857) 2 H. & N. 339 and *Brassard* v. *Smith* [1925] A. C. 371.

Bradbury v. *English Sewing Cotton Co.* [1923] A. C. 744, 753 distinguished.

ACTION WITH WITNESSES.

The plaintiff, Walter Baelz, was a German national residing in Berlin, and the defendant was sued as the custodian of

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enemy property under the Trading with the Enemy Amendment Act, 1914. The claim was for a declaration that the plaintiff was entitled to one-third of 500 ordinary and 500 preference shares of 1*l.* each in a company called Arnold J. Van den Bergh, Ld., and that his property, right, and interest in the shares and dividends were not on January 10, 1920, a property, right. or interest situate within His Majesty's dominions, or subject to the charge imposed by the Treaty of Peace Orders, 1919–1921, made pursuant to the Treaty of Peace Act, 1919. The facts were not in dispute. On December 22, 1907, the trading corporation of Arnold J. Van den Bergh, Ld., was registered in England under the Companies Acts as a limited liability company, and the business was the manufacture of wooden casks, boxes, and the like, the factories for the manufacture of the same being in Amsterdam and Rotterdam in Holland. By the articles of association of the company, as modified by special resolutions of April 28 and May 26, 1909, it was provided that all meetings of the company, whether of members or directors, should be held in Holland, and all such meetings were in fact so held. Since 1909 the whole of the administrative business of the company was conducted in Holland by the managing director or directors domiciled and resident in Holland, and at no time since 1909 had the company sold any goods or done any business in the United Kingdom. The company had not been assessed for income tax in England on its profits or earnings, but the register of shareholders was kept in England and a banking account was kept in London in order to pay dividends to members in England.

The plaintiff was one of the children of Herman Baelz, a German national domiciled in Germany, who was the owner of these 500 ordinary shares and 500 preference shares in the said company. Herman Baelz died intestate on August 24, 1918, leaving a widow and three children, to whom his estate passed in equal shares according to German law. Letters of administration to his estate were granted to the Public Trustee as attorney for the plaintiff. The widow died on March 26, 1919, and letters of administration to her estate

were granted to the defendant as the attorney of the plaintiff on May 4, 1923. Dividends to the amount of 902*l.* 10*s.* on the above mentioned shares in the company were received by the defendant as such custodian of enemy property. Since January, 1920, the company had gone into liquidation. The plaintiff was at all material times a German national resident in Germany, and by his action claimed a declaration that he was entitled to one-third of the said shares and one-third of the dividends thereon, and that the property, right, and interest of the plaintiff in the same on January 10, 1920, was not a property, right, or interest situate within His Majesty's dominions, and was not subject to the charge imposed by the Treaty of Peace Act, 1919, and Orders, 1919–1921.

The defence admitted the main facts, and contained an assertion that the plaintiff's property, right, and interest in the said shares was property, etc., within His Majesty's dominions, and subject to the charge.

Gover K.C. and *Richard O'Sullivan* for the plaintiff. The title to the beneficial interest in the shares in question depends upon whether they come within the words of the Peace Treaty Order of 1919 as "property, rights, and interests" in this country belonging to German nationals at the date of the coming into force of the Treaty of Versailles. The question therefore is whether the real home or domicil of this company was in England or Holland. A share is a chose in action, and the local situation of these shares is the local situation of the company to which they belong and where the business of the company is carried on: Dicey's Conflict of Laws, 2nd ed., pp. 160–161. The place of registration of the company is not decisive for all purposes. The domicil of an incorporated trading company is determined by the situation of its principal place of business. That was so determined in the older cases of *Cesena Sulphur Co.* v. *Nicholson* (1) and *Jones* v. *Scottish Accident Insurance Co.* (2)

From the admitted facts it would appear that although the company was registered in England and had an office in

(1) (1876) 1 Ex. D. 428. (2) (1886) 17 Q. B. D. 421.

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England the whole administration, management, and control of the factories belonging to the company was carried on in Holland. We submit that the English domicil of origin in this case was abandoned. In *Bradbury* v. *English Sewing Cotton Co.* (1), which was an income tax case, Viscount Cave L.C. said that the locality of the shares or stock of a company was to be determined not by its place of incorporation or registration, but by its place of residence and trading, and he went on to say that a share was an "incorporeal thing carrying the right to a share in the profits of the company; and where the company is, there the share is also." Lord Wrenbury in that same case (2) defined a share as a fractional part of the capital, which conferred upon the holder a certain right to a proportionate part of the assets of the corporation.

Therefore the local situation of the shares depends upon the local situation of the company, and if that be so on the facts which are in evidence of the intention of the directors of this company, Holland was the real sphere of its operations. The test of residence is not where a company is registered, but where it keeps house: *De Beers Consolidated Mines* v. *Howe* (3), and that is a question of fact.

A registered company can have more than one residence for the purposes of the Income Tax Acts, but only one domicil: *Swedish Central Ry. Co.* v. *Thompson* (4), where *Bradbury* v. *English Sewing Cotton Co.* (5) was discussed and approved. *Brassard* v. *Smith* (6) may be referred to by the defendant. That was a succession duty case, and an older case of *Attorney-General* v. *Higgins* (7) was therein approved. In the present case the local situation of these shares was Holland.

Gavin Simonds K.C. and *Stamp* for the Public Trustee. This being a question of a chose in action which has no existence in space, an artificial situation has to be ascribed to it. The case comes within *Attorney-General* v. *Higgins* (7), which has been consistently adopted ever since, and was in particular

(1) [1923] A. C. 744, 753.
(2) [1923] A. C. 767.
(3) [1906] A. C. 455.
(4) [1925] A. C. 495.
(5) [1923] A. C. 744.
(6) [1925] A. C. 371.
(7) (1857) 2 H. & N. 339.

approved in *Brassard* v. *Smith.* (1) The domicil of this company is England, where its registered office is situated and the register of members is kept. It is here and here alone that the status of the shareholders can be effectively determined and their rights enforced. The question of domicil has been raised in income tax cases and death duty cases: Hanson's Death Duties, 6th ed., p. 89. The remarks of Cave L.C. in *Bradbury* v. *English Sewing Cotton Co.* (2) were directed to the locality of shares for the purposes of income tax incidence, as he explained in a subsequent case.

[They also referred to *In the Goods of Ewing* (3); *In re Clark* (4); and *Public Trustee* v. *Wolf.* (5)]

Cur. adv. vult.

June 24. EVE J. delivered the following written judgment: The facts in this case are not in dispute. The plaintiff is and was at all material times a national, resident in Germany, and on January 10, 1920, when the charge imposed by the Treaty of Peace attached to all property, rights, and interests within His Majesty's dominions belonging to German nationals, he was the beneficial owner of certain preference and ordinary shares standing in the name of his late father, in the books of a trading corporation known as Arnold J. Van den Bergh, Ld., registered in England on December 22, 1907, under the Companies Acts with limited liability, and formed to acquire and continue a business of manufacturing wooden casks, boxes, cases and the like theretofore and since carried on wholly in Holland. In 1909 the company's articles were so modified as to provide that all meetings of the members and directors should be held in Holland, and from that date all such meetings have in fact been held in Holland, and the whole of the administrative business of the company has been conducted in and from Holland by the managing director or directors domiciled and resident in that country. In these circumstances the company has been treated for

(1) [1925] A. C. 371.
(2) [1923] A. C. 744.
(3) (1881) 6 P. D. 19.
(4) [1904] 1 Ch. 294.
(5) [1923] A. C. 544.

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revenue purposes as resident in Holland, and since 1909 has not been assessed for income tax in this country on its profits or earnings. The company's register of members is kept at the registered office situate in England. On the foregoing facts the plaintiff claims that his interest as a shareholder in the company was not subject to the charge, because, as he insists, the true location to be ascribed to the shares is in Holland, where the company's principal place of business is to be found and where it can only properly be said to keep house and do business and to be domiciled. In support of these contentions reliance is placed upon certain statements in Dicey's Conflict of Laws and some extracts from speeches delivered in the House of Lords. At p. 160 of the second edition of Dicey under the heading of "Domicil of Legal Persons or Corporations," r. 19 states that "the domicil of a trading corporation is its principal place of business, that is, the place where the administrative business of the corporation is carried on," and on p. 162 the same proposition is repeated in slightly different phraseology. And, subject to a significant qualification, the language of Lord Loreburn in *De Beers Consolidated Mines* v. *Howe* (1) points to the same conclusion. He says: "In applying the conception of residence to a company, we ought, I think, to proceed as nearly as we can upon the analogy of an individual. A company cannot eat or sleep, but it can keep house and do business. We ought, therefore, to see where it really keeps house and does business"; and a few lines lower down he adds: "The decision of Kelly C.B. and Huddleston B. in *Calcutta Jute Mills* v. *Nicholson* (2) and *Cesena Sulphur Co.* v. *Nicholson* (2) . . . . involved the principle that a company resides for purposes of income tax where its real business is carried on. Those decisions have been acted upon ever since. I regard that as the true rule, and the real business is carried on where the central management and control actually abides." The introduction of the words "for purposes of income tax" indicates the limit to be imposed on the application of the principle. There

(1) [1906] A. C. 455, 458. (2) 1 Ex. D. 428.

is nothing to support the view that a change of residence by the company will operate to transplant the interest of the individual as a shareholder to the locality of the new residence. For the contributory's title to his shares, his status as a shareholder and the enforcement of his rights, recourse must be had to the statutory register, which remains localized at the registered office, and to the Court, with which alone, under s. 32 of the Companies (Consolidation) Act, 1908, abides the power to rectify the register. The language of the Lord Chancellor in *Bradbury* v. *English Sewing Cotton Co.* (1), where he says that shares in a company are locally situate where the company's principal place of business is to be found and that "where the company is, there the share is also," affords the plaintiff no assistance after the Chancellor's own explanation in *Swedish Central Ry. Co.* v. *Thompson* (2), that his words were not directed to any question of residence, but to the position of the shares as a source of income for income tax purposes.

The case is, in my opinion, covered by the decisions in *Attorney-General* v. *Higgins* (3) and *Brassard* v. *Smith* (4), and the action fails and must be dismissed with costs.

Solicitors: *Cruesemann & Rouse; Coward, Chance & Co.*

(1) [1923] A. C. 744, 753.
(2) [1925] A. C. 495, 501.
(3) 2 H. & N. 339.
(4) [1925] A. C. 371.

G. M.

EVE J. 1926 *July* 16, 20.

HARMS (INCORPORATED), LIMITED, AND CHAPPELL AND COMPANY, LIMITED *v.* MARTANS CLUB, LIMITED.

[1926. H. 815.]

Copyright—Infringement—Musical Play—Performance at a Club—"In public"—Copyright Act, 1911 (1 & 2 *Geo.* 5, *c.* 46), *ss.* 1, 2.

The plaintiffs were the owners of the copyright in a musical play called "Tip Toes," published and brought out in America, but not yet produced in England. The defendants were a limited company and the proprietors of the Embassy Club in Old Bond Street, London, which had a membership of 1800 ladies and gentlemen of high social standing, and was a club for dining and dancing. On March 4, 1926, a musical number forming part of the play "Tip Toes" and entitled "That Certain Feeling," was performed by an orchestra at the Embassy Club before an audience of 130 members and 50 guests. Under the rules of the club membership was subject to annual re-election and there was no limit fixed to the number of guests that might be introduced by members:—

Held, that the performance at the club was a performance "in public" within the meaning of the Copyright Act, 1911, and constituted an infringement of the copyright of the plaintiffs. A declaration to that effect was made and liberty given to the plaintiffs to apply for an injunction if necessity arose.

Duck v. *Bates* (1884) 13 Q. B. D. 843 discussed.

WITNESS ACTION.

The first plaintiffs were the owners of the copyright in America of a musical play entitled "Tip Toes," and of a musical work forming part thereof, entitled "That Certain Feeling." Chappell & Co., Ld., were the musical publishers and equitable owners of the copyright in the said works. The defendants were the owners of a proprietary social and dancing club of the highest standing, and known as the "Embassy Club," in Old Bond Street, London. On March 4, 1926, the plaintiffs alleged that the defendants, without the consent of the plaintiffs, had performed or authorized the performance of the musical work, "That Certain Feeling," by their orchestral band in public at the Embassy Club. The plaintiffs alleged that this constituted an infringement of their copyright, and claimed: (1.) An injunction to restrain the defendants from infringing the plaintiffs' copyright in

the musical work, "That Certain Feeling," by performing the same in public without the consent of the plaintiffs, and from permitting the Embassy Club, or other place of entertainment, to be used for the performance in public of the said work without the plaintiffs' consent; and (2.) damages.

The defendants admitted the performance on March 4, 1926, but maintained that it was not "in public." It appeared that the total number of members of the Embassy Club was 1800, and on the night in question 130 members of the club had dined, and some 50 guests were also present at the subsequent performance and dancing. By the rules of the club there was no limit stated as to the number of guests who might be introduced by members, but 10*s.* was to be paid for each visitor introduced after 9 P.M. The musical play, "Tip Toes," had been published simultaneously in the United States of America and a few copies in this country, but the play had not yet been produced in England. There was evidence by Mr. William Boosey, managing director of Chappell & Co., Ld., to the effect that the life of a popular song was short, and that the damage caused by the premature performance of musical pieces before production would cause great loss to the owners of the copyright.

The other facts and the description of the club sufficiently appear from the judgment.

Gover K.C. and *Hon. S. O. Henn Collins* for the plaintiffs. The short question raised in this action is whether this performance of a part of this play, "Tip Toes," at the Embassy Club, without the consent of the plaintiffs, was a "performance in public" within the meaning of the Copyright Act, 1911, ss. 1 and 2. (1) The facts are practically admitted.

(1) By s. 1 of the Copyright Act, 1911, it was enacted:—

Sub-s. 1: Subject to the provisions of this Act copyright shall subsist . . . . for the term hereinafter mentioned in every original literary dramatic musical and artistic work.

Sub-s. 2: For the purposes of this Act "copyright" means the sole right to produce or reproduce the work, or any substantial part thereof in any material form whatsoever, to perform . . . . the work or any substantial part thereof in public. . . . .

Sect. 2, sub.-s. 1: Copyright in a work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright,

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The presence of so many guests introduced by members makes it impossible to say that this was a domestic or private entertainment. In the case of these light musical plays it is of high importance to their success that no part of the music should become familiar to the public before the whole play is produced. That is proved by the evidence of Mr. Boosey, who has had an experience of forty years in this class of music, and considers that a performance of this character would have a most serious influence on the production of the play, which is now under contract to be produced in England, and would cause material damage. Popular tunes of this character, he said, had a short life, and should come as a great surprise on the first night. On the construction of the Copyright Act, 1911, the expression " in public " must be construed having regard to the general object of the Legislature, which was to protect the rights of the author or owner of the copyright, so that he may reap the profits of his work. The authorities bearing on this point are *Russell* v. *Smith* (1) and *Duck* v. *Bates*. (2) In the last case reference was made by Bowen L.J. in his judgment to entertainments of a domestic or quasi-domestic character, which might not come within the prohibition of the statute, but the circumstances of the performance here could not bring it within the description of what was domestic or quasi-domestic. This club is not an ordinary social club, and the question of what a " performance in public " means is a question of fact for the Court to determine, having regard to all the surrounding circumstances.

Vaisey K.C. and *Winterbotham* for the defendants. It is a case of the construction of the statute. " In public " is the narrowest expression that could be used, and differs somewhat from " a public performance." There can be a difference between a performance in public and a public performance. The remarks of Bowen L.J. in *Duck* v. *Bates* (2) as to quasi-domestic entertainments are precisely in point. In the

does anything, the sole right to do which is by this Act conferred on the owner of the copyright.

(1) (1848) 12 Q. B. 217.
(2) 13 Q. B. D. 843, 850.

present case the club is a private club, and the performance was before a limited class of members and their guests, and was of a quasi-domestic character. None of the public were admitted. Publicity is to be read reasonably and sensibly. The rules of this club have been strictly adhered to, and it is a private dancing club in no sense open to the public. *Marks* v. *Benjamin* (1); *Caird* v. *Sime*. (2)

It is for the plaintiffs to bring themselves within the ambit of the statute and establish that this was a performance in public.

Hon. S. C. Henn Collins in reply distinguished the cases referred to on behalf of the defendants.

Cur. adv. vult.

July 20. EVE J. delivered the following written judgment: The sole question in this action is whether the performance on March 4, 1926, by the orchestra at the Embassy Club of a musical work entitled "That Certain Feeling," was a performance in public. If so, it was admittedly an infringement of the plaintiffs' copyright, and they are entitled to the relief they claim, but if the performance was a private or domestic one there was no infringement, and the plaintiffs cannot obtain any relief in respect thereof.

The result of the reported cases wherein the issue has been debated whether a particular representation was a public or private one is to leave the matter, to a large extent, a question of fact to be determined according to the circumstances of each case. I do not attach any different meaning to the expressions "performance in public" and "public performance," but in considering to which conclusion the facts when ascertained lead, it must be borne in mind that, although the object of the law is to protect the owner of the copyright from injury, the Act clearly contemplates performances other than performances in public, and, inferentially, the possibility that some damage may be inflicted for which no remedy exists. This position would seem to raise a presumption that in determining the ultimate question, the quantum of damage

(1) (1839) 5 M. & W. 565. (2) (1887) 12 App. Cas. 326.

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likely to accrue and, as being intimately connected with that inquiry, the number and class of persons invited or having the right to be present at the performance, are factors to be noted. An audience, for example, composed in the main of those who would in the ordinary course pay for admittance to a performance authorized by the owner might well be regarded as more representative of the public than a larger aggregation of persons less interested in the subject matter, and certainly the resultant loss in the former case would be likely to exceed that in the latter.

Authority for these propositions is, I think, to be found in the following extracts from the considered judgments of Brett M.R. and Bowen L.J. in *Duck* v. *Bates*. (1) In that case the question was whether a room in Guy's Hospital, where a dramatic piece was represented without the consent of the proprietor of the copyright, was or was not a place of public entertainment. The Master of the Rolls, after stating (1) that what was intended to be protected was the value of the author's invention, and that this is the key to the construction of the Act, returns to this point, where he says: "As I have already intimated, the author wants protection for the pecuniary value of his drama; and a representation in a private room is of no pecuniary value. In order to entitle the author to penalties, there must be a representation which will injure the author's right to money; such, for instance, as a representation, which, although it is not for profit, would attract persons who are willing to pay money, and would induce them not to go to see a performance licensed by the author"; and a few lines lower down he adds: "The representation must be other than domestic and private. There must be present a sufficient part of the public who would go also to a performance licensed by the author as a commercial transaction"; and finally he restates his conclusion in these words: "A private representation will not injure an author; but a public representation—that is, a representation to which any portion of the public are freely admitted either with or without payment—is prohibited by

(1) 13 Q. B. D. 843, 845, 847, 848.

the statute, unless the proprietor of the copyright consents thereto." Bowen L.J. (1) expresses himself thus: "The true view is that in order to incur the penalties of the Act, the place of dramatic entertainment must be some spot for the occasion appropriated to the dramatic entertainment of a portion of the public; and then the question of fact will arise, whether the place has not been so appropriated on any particular occasion; profit is a very important element; the question of numbers also is very important, these are matters to be taken into consideration. . . . . Some domestic or quasi-domestic entertainments may not come within the Act; suppose that a club of persons united for the purposes of good fellowship gives a dramatic entertainment to its members; I do not say that the entertainment will necessarily fall within the prohibition of the statute."

The defendants here, basing themselves to some extent on the doubt expressed by the Lord Justice, contend that the performance was not otherwise than private and domestic, in that it took place on the premises of the club used solely by members and their guests. But does this conclude the matter? I think not. Further information as to the constitution of the club, its numerical strength and the class of persons to whom the use of the club premises was open on the occasion in question, must be considered. The defendant company (Martan's Club, Ld.) is the proprietor of the club. The capital of the company is 12,500*l.*, divided into 2500 5 per cent. preference shares and 10,000 ordinary shares, all of 1*l.* each. There are some 1800 honorary and ordinary members, all ladies and gentlemen of good standing in society (I quote from r. 2) and drawn from a class appreciative of such attractions as musical plays and light opera. According to r. 3, "it is of the essence of the constitution of the club that no person shall be a member thereof without becoming also a member of the company, and that every member of the company shall be a member of the club." It is therefore incumbent on each person, on election as a member, to accept and pay for one preference share in the

(1) 13 Q. B. D. 843, 849, 850.

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company's capital, and any member ceasing to be a shareholder of the company ipso facto ceases to be a member of the club. Ladies and gentlemen from overseas are eligible for election as members upon payment of two guineas, which entitles them to the privileges of the club for one month. The club premises consist, on the ground floor, of an entrance hall, cloak rooms and other offices, and a large room, or salon, wherein luncheons and dinners are served, and after 10 P.M. dancing takes place. Below, there is a refreshment bar and lounge. It is essentially a club for dancing. All the members are entitled to the privileges of the club, and amongst them is liberty to introduce visitors. No charge is made for visitors introduced, who have lunch, tea or dinner at the club, but every member introducing guests after 9 P.M. has to pay 10*s*. for each guest so introduced. All the members are elected for the current year only, and are subject to re-election by the general committee annually at their first meeting in each year. On the evening of March 4 the maximum number of persons present in the club was 180, of whom 130 were members and the rest were guests.

Upon these facts, ought I to hold that a performance open to be attended by as many of the 1800 members and their guests as could be accommodated on the club premises was a domestic, or even quasi-domestic, affair? If the Master of the Rolls, when he said, "a private representation will not injure an author," meant, as I think he did, having regard to the earlier passages I have already quoted from his judgment, that the quantum of damage resulting to the copyright owner is an element to be considered in determining whether the performance is public or private, there can be no doubt that in this case the performance was calculated to do serious damage. To that Mr. Boosey has deposed, for not only were the persons attracted to it persons who would have been willing to pay money to hear it at a performance licensed by the copyright owners as a commercial transaction, but the premature disclosure of this or any other detached part of the play is calculated to detract from the freshness and and attractiveness of the whole play when ultimately produced

in this country. But beyond all this, I think that the fact that, subject to the necessary limitations of space, this performance could have been attended by 1800 members of the club, each bringing one or more guests, members of the general public, introduces an element so alien to any idea of privacy or domesticity as to stamp the performance with a publicity sufficient to make it an infringement of the plaintiffs' copyright.

Accordingly, I will make a declaration to that effect, and order the defendants to pay the costs. The plaintiffs can have liberty to apply for an injunction if necessity arises.

Solicitors: *Pollock & Co.; Whitelock & Storr.*

G. M.

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[1926. N. 100.]

Licence—Licence to construct and work Railway over Land of Licensor—Fixtures—Removal of Railway Structures—Right of Licensor to compel Removal on Termination of Licence—Breach of Contract—Anticipatory Breach.

Under agreements made in 1923 and 1925, the plaintiffs were granted the right to occupy sufficient land of the defendants for the purpose of constructing and working a railway until the termination of the Exhibition to be held on the grounds of the defendants at W. during 1924 and 1925; whereupon the plaintiffs were to be at liberty to sell all their property and other assets at W. to a purchaser to whom the defendants agreed to grant an option to occupy the land for the further period of one year thereafter and a further option to continue such occupation from year to year for a total period not exceeding six years from the closing of the Exhibition.

The plaintiffs accordingly constructed a railway on the grounds of the defendants part of which was carried on a viaduct supported by concrete pillars, the foundations of which and of the rest of the track were embedded in the soil, and worked the same until the closing of the Exhibition on October 31, 1925. On December 30 the defendants purported to terminate their agreements with the plaintiffs on the

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ground that the same had lapsed owing to the plaintiffs' delay in exercising the option of calling for a renewal of the licence to occupy the defendants' land in favour of a purchaser of the railway undertaking. In an action by the plaintiffs for a declaration that they were entitled to sell their undertaking with the benefit of the options and for an injunction to restrain the defendants from disposing of their land, except subject to the rights of the plaintiffs under the agreements, the defendants counterclaimed an order against the plaintiffs to remove the erections and other structures from their land or damages for leaving them there. The Court, after deciding that by purporting to terminate the agreements the defendants had committed an anticipatory breach thereof and directing an inquiry as to the damages suffered by the plaintiffs :—

Held, that on the true construction of the agreements, in the absence of any stipulation, either express or implied, for the removal by the plaintiffs of the erections and other structures at the termination of the licence, and also having regard to the necessity for the same remaining on the grounds of the defendants for the benefit of a purchaser of their railway undertaking, in pursuance of the agreements, and the same having been affixed to the soil, the maxim "Quicquid plantatur solo, solo cedit" applied, and no obligation rested on the plaintiffs to remove them from the defendants' land.

WITNESS ACTION.

The facts, which are taken from the judgment of Lawrence J., were as follows :—

At the date of the agreement next hereinafter mentioned the defendant company (hereinafter called "the defendants") was in occupation of the grounds at Wembley, Middlesex, on which the British Empire Exhibition was held in the years 1924 and 1925. Part of such grounds belonged to the defendants in fee, other part was leased to the defendants by the Metropolitan Railway Co., and the remainder was occupied by the defendants under licence from the London and North Eastern Railway Co.

By an agreement dated December 6, 1923, and made between the defendants of the one part and Never-Stop Transit, Ld. (hereinafter referred to as "the Transit company"), of the other part it was agreed (inter alia) that (clause 1) the defendants should grant to the Transit company the right to occupy so much land as might be reasonably necessary for the purpose of the construction, erection, equipment and operation of a Never-Stop Railway line in the grounds of the Exhibition to be held in 1924, at Wembley,

such line to be constructed in accordance with plans to be approved by the defendants, but so that the Transit company might continue to operate the said line until the termination of the Exhibition, and at the termination thereof the subsidiary company (afterwards referred to) should be at liberty to sell all its property and other assets at Wembley, and in that event the defendants should grant to the purchasers thereof an option, exercisable by notice in writing to the defendants within fourteen days after the signature of the contract for sale, to occupy the land, the subject matter of that agreement, for a further period of one year from the closing of the Exhibition, and the like option, exercisable by notice in writing given to the defendants at least three calendar months before the expiration of such further year, to extend such occupation for another year, and in like manner to extend the same from year to year for an aggregate period not exceeding seven years from the closing of the Exhibition, and the defendants, if desired by the purchasers, should use their best endeavours to obtain from any persons, companies and authorities (parliamentary, public bodies or otherwise) for the said purchasers the full benefit of such option from time to time exercised by them, and (clause 2) for the purpose of carrying into effect that agreement the Transit company should cause a subsidiary company to be registered, which company should construct, erect, equip and operate such line in accordance with certain plans therein mentioned, and the memorandum and articles of association of such subsidiary company should be approved by the defendants, and should provide that one-third of the board of directors should be nominated by the defendants, whose nominees should be permanent directors, and (clause 3) the defendants should subscribe for debentures in the subsidiary company for 35,000*l.*, and the subsidiary company should issue the same, accordingly, in manner therein mentioned, and (clause 4) the Transit company should cause the benefit of that agreement to be transferred to the subsidiary company as soon as such company had been incorporated. As a matter of fact the Transit company had already, before the date of the 1923

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agreement, with the privity of the defendants, formed the plaintiff company as the subsidiary company mentioned in such agreement, which company had on November 12, 1923, been duly incorporated under the Companies Acts, 1908 to 1917, as a company limited by shares, with the object of constructing, erecting, equipping and operating the Non-Stop Railway, and of taking over the burden and benefit of the 1923 agreement.

By an agreement dated December 7, 1923, and made between the Transit company of the one part and the plaintiff company (hereinafter called the "plaintiffs") of the other part, the benefit of the 1923 agreement was sold and transferred by the Transit company to the plaintiffs. In due course the plaintiffs constructed the Never-Stop Railway line partly on the land leased to the defendants by the Metropolitan Railway, partly on the defendants' freehold land, and partly on the land occupied by the defendants under licence from the London and North Eastern Railway. As so constructed, the line ran in places upon, in other places above, and in yet other places below the natural surface of the ground. On the defendants' freehold land, for about half its length, the line was carried on a viaduct supported by a number of massive concrete pillars. The foundations of these pillars, as well as of the rest of the track, were firmly embedded in the soil. The cost of the construction and equipment of the line amounted to the sum of 140,000*l.*, which the plaintiffs raised by the issue of debentures for that amount, which are now outstanding, and of which 35,000*l.* worth are held by the defendants. The line was operated by the plaintiffs during the 1924 Exhibition, but no profit resulted from such operation.

Towards the end of the year 1924, the defendants determined to continue the Exhibition for another year, and on February 17, 1925, a supplemental agreement was entered into between the defendants of the first part, the Transit company of the second part, and the plaintiffs of the third part, whereby it was agreed that the 1923 agreement should be read and construed as if (1.) the words "and 1925" had been inserted

between the words "to be held in 1924" and "at Wembley" in clause 1 thereof, and (2.) the word "six" were substituted for the word "seven" in the twenty-first line of such clause, to the intent that the subsidiary company referred to in the same clause (being the plaintiffs) should be at liberty to sell all its property and other assets at Wembley, with the like rights in favour of the purchasers thereof, at the termination of the Exhibition to be held in 1925, as would have been applicable had that extension not been granted, and so that the options referred to in such clause should be exercisable, as in the said clause provided, for an aggregate period not exceeding six years from the closing of the Exhibition to be held in 1925.

In accordance with this agreement, the line was operated by the plaintiffs during the 1925 Exhibition with better financial results than before, but not so as to enable any profit to be distributed. The Exhibition terminated at 11 P.M. on Saturday, October 31, 1925, and on November 10, 1925, the defendants went into voluntary liquidation; the three last named defendants being appointed the liquidators.

On December 16, 1925, the solicitors of the plaintiffs wrote to the liquidators to inquire whether they would be prepared to renew the licence in favour of the plaintiffs for another year on the terms of the then existing agreements, instead of such renewal being granted to the purchasers from the plaintiffs.

On December 30, 1925, Mr. Chater, on behalf of the liquidators, wrote in reply that they were not prepared to extend the licence in the manner suggested, and then added: "Moreover, in view of the time that has elapsed since the close of the Exhibition, the liquidators consider that the licence in favour of your clients has lapsed, and I am directed on behalf of the liquidators to give you notice that they require your clients to take immediate steps for the removal of their undertaking from the Exhibition lands." The defendants having persisted in the attitude taken up in this letter, the plaintiffs on January 23, 1926, issued the writ in this action, claiming a declaration that, under the 1923 and

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1925 agreements, the plaintiffs were entitled to sell all their property and assets at Wembley with the benefit of the options contained in the agreements, and an injunction to restrain the defendants from selling or disposing of the undertaking and assets of the defendants except subject to the rights of the plaintiffs.

The defendants counterclaimed that the plaintiffs might be ordered to remove from the land of the defendants the erections and other structures which the plaintiffs had erected thereon or, alternatively, for damages.

At the trial it transpired that the liquidators were most anxious to put up the freehold land belonging to the defendants for sale by auction at the earliest possible moment, free from the options which the defendants had agreed to grant to the purchasers of the plaintiffs' undertaking; and, accordingly, an arrangement was made by counsel for the respective parties that, in consideration of the defendants surrendering the debentures which they held in the plaintiff company, the plaintiffs would forego any right they might have to specific performance of the 1923 and 1925 agreements and would confine their claim to damages for breach of those agreements. It was further arranged between the parties that, if the plaintiffs should succeed in establishing that the defendants had committed a breach of the agreements, the defendants would, without any proof of damage, submit to an inquiry as to the damages (if any) sustained by the plaintiffs by reason of such breach.

—In those circumstances, the only questions (apart from the counterclaim) which the Court had to decide were: first, whether the liberty granted to the plaintiffs to sell its undertaking at Wembley together with the benefit of the options was still operative on December 30, 1925; and, secondly, whether the letter of December 30, 1925, amounted to an anticipatory breach of the agreements which justified the plaintiffs in commencing an action for damages on January 23, 1926.

So far as regards those two questions, it is sufficient to state that the Court held, first, that a reasonable time after

the closing of the Exhibition, within which the plaintiffs might exercise their option, had not elapsed on December 30, 1925, as it must have been within the contemplation of the parties to the agreements that the plaintiffs should be afforded reasonable time to ascertain for the satisfaction of a purchaser of the railway undertaking the use to which the grounds were going to be put after the closing of the Exhibition; and secondly, that on the authority of *Frost* v. *Knight* (1); *Berners* v. *Fleming* (2); and *Jones* v. *Barkley* (3), in view of the arrangement come to at the trial, the effect of which was to place the parties in the same position as if the defendants had on December 30, 1925, refused to carry out the agreements in any event, the plaintiffs were entitled at the date of the writ to treat the letter of December 30, 1925, as an anticipatory breach of the agreements and to commence an action for damages without first going through the form of selling their undertaking; and, accordingly, an inquiry was directed as to the damages (if any) sustained by the plaintiffs by reason of such breach.

The part of the case material to the purpose of this report relates to the question raised by the defendants' counterclaim, whether the plaintiffs were bound to remove the erections and other structures which they had affixed to the defendants' land.

Jenkins K.C. and *Roger W. Turnbull* for the defendants counterclaiming. An agreement by the plaintiffs must be implied to remove the railway fixtures from the defendants' land upon the termination of the licence. The licence is to occupy the defendants' land by erecting concrete pillars and other railway structures on the land for the purpose of carrying the railway over it. If on the termination of the licence the plaintiffs are entitled to leave those erections and other structures upon the defendants' land they are in effect remaining in occupation of the land, in spite of the licence having been determined. The erections

(1) (1872) L. R. 7 Ex. 111. (2) [1925] Ch. 264.
(3) (1781) 2 Doug. 684, 694.

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and other structures never became the property of the defendants.

Owen Thompson K.C. and *J. E. Harman* for the plaintiffs. The plaintiffs are not bound, in the absence of an express agreement to that effect, to remove the erections and other structures in question. The terms must be found in the contract itself, and the parties are not entitled to look for any of them outside the four corners of the contract. No agreement to remove the erections ought to be implied. They became part of the land and belong to the defendants. That is the result of affixing something to the land in the case of a landlord and his tenant, and there is no difference in principle between that and the case of licensor and licensee.

Cur. adv. vult.

April 27. LAWRENCE J. delivered a considered judgment in which, after first deciding in favour of the plaintiffs' claim as above stated, he proceeded as follows: There remains the counterclaim to be dealt with. At the Bar the counterclaim was confined to a claim for an order upon the plaintiffs to take down and remove all erections and other structures built by the plaintiffs on the defendants' freehold land, or alternatively, for damages for leaving such erections and structures on such land. At the trial the greatest stress was laid on the removal of the viaduct, it being estimated that the cost of taking down and removing the superstructure and pillars would amount to over 8000*l.* Mr. Jenkins contended as a proposition of law that, apart from any express or implied agreement, if a freeholder grants to A. a licence to occupy part of his land for a purpose involving the erection on such land of a building for A.'s sole use during the currency of the licence, then, at the termination of the licence, A. is bound not only to remove himself and all his goods and chattels from the land, but also to take down and remove the building which he has erected. No authority in support of any such general proposition was produced; and, in the absence of any such authority, I decline to accept it as sound. In the

case of landlord and tenant, it is well settled that, in the absence of an agreement to the contrary, any building erected by the tenant upon the demised land immediately becomes part of the land itself, and at the expiration of the lease reverts to the landlord. In such a case, unless the building has been erected in contravention of some stipulation in the lease, the landlord obviously has no right to compel the tenant to take it down and remove it.

The relationship of licensor and licensee which existed here seems to me to present an a fortiori case. The right granted to the plaintiffs was a mere licence to occupy so much of the defendants' land as was necessary for the purpose of working the railway line, and no estate whatever in the land passed to the plaintiffs. Therefore, when the erections and other structures were annexed to the land, they immediately vested in the defendants as owners of the soil, and the only right which the plaintiffs had was, during the currency of the licence, to occupy such erections and structures as part of the defendants' land necessary for the purposes of the line. As the erections and structures were built not in contravention of any stipulation in the agreements, but on the contrary with the express approval of the defendants, the latter have, in my opinion, no right, in the absence of any express or implied agreement in that behalf, to compel the plaintiffs to take them down and remove them. It is not suggested that there was any express agreement between the parties as to the removal of the erections and other structures at the termination of the agreements, but Mr. Jenkins contended that an agreement for their removal ought to be implied. The absence of any express agreement to that effect is, in my opinion, not without significance. If it had been the intention of the parties that the plaintiffs should be obliged to remove the erections and other structures, I should have expected that the agreements would have contained some provision (similar to the provisions contained in the Metropolitan Co.'s lease of June 28, 1923, and in the London and North Eastern Railway Co.'s agreement of July 2, 1923), that at the expiration or sooner determination of the agreements

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the plaintiffs should take down and remove the erections and other structures, and restore and make good the sites thereof to the satisfaction of the defendants. Mr. Jenkins gave as a reason for the absence of any such provision that the agreements were drawn up in a hurry, from which I infer that the question of imposing an obligation upon the plaintiffs to take down and remove the erections and other structures was not gone into or considered at all. Be that as it may, I am of opinion that no such implication as the defendants desire the Court to make can fairly be made merely from the terms of the written agreements. There is nothing, so far as I can see, in the agreements which would render the maxim "Quicquid plantatur solo, solo cedit" inapplicable. The mere fact that the defendants do not desire to retain or make use of the erections and other structures, does not, in my judgment, afford any reason for making the desired implication. Nor does the liberty conferred upon the plaintiffs to sell all its property and other assets lead to the conclusion that the erections and other structures were from the first to be, and at the termination of the licence to remain, the property of the plaintiffs. The expression "all its property and other assets" in my opinion has reference solely to the undertaking and all the personal goods and chattels (such as the cars, machinery and other equipment) belonging to the plaintiffs, and was not intended to, and did not in fact, embrace erections and other structures which the plaintiffs had built on the land so as to become part of the soil, and in which the plaintiffs had no estate or proprietary interest. Moreover, under the agreements the plaintiffs were expressly given liberty to sell their undertaking and assets in such a manner as to enable the purchaser to operate the railway line, in which event the defendants were to grant to such purchaser an option to occupy for a further term the land forming the site of the railway, which land would necessarily include the erections and other structures upon it. If the plaintiffs had sold their undertaking under such liberty, and the purchaser had exercised the option, it obviously was not the intention of the parties that the plaintiffs should take down and remove

the erections. In such an event, although the plaintiffs' licence to occupy would ex concessis have determined, and the rights and liabilities thereunder as between the plaintiffs and the defendants would have come to an end, yet the erections and other structures would have had to remain on the land for the benefit of the purchaser. This fact points to the conclusion that any implied agreement for the removal of the erections and other structures would require to be carefully moulded, a task which counsel has not attempted. Further, if it be suggested that the implied agreement to take down and remove the erections and other structures should be so framed as to become operative, only if the liberty of selling granted to the plaintiffs were not exercised, then I am of opinion that the refusal by the defendants to carry out their obligation to grant the options affords a good answer to the counterclaim. It seems to me that in that case the defendants would be seeking to enforce in this Court a liability under the agreements, which liability had only arisen because of their own wrongful refusal to perform their part of those agreements.

In the result, I have come to the conclusion, first, that, in the absence of any agreement between the parties, there is no obligation on the plaintiffs to take down and remove the erections and other structures, and, secondly, that in the circumstances no agreement imposing any such obligation on the plaintiffs ought to be implied. I therefore dismiss the counterclaim with costs.

Solicitors: *Waterhouse & Co.; Slaughter & May.*

H. C. H.

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THISELTON *v.* COMMERCIAL UNION ASSURANCE COMPANY, LIMITED.

[1924. T. 2111.]

Insurance—Life Policies—Advances on Security of Policies—Rate of Interest—Increase—Prospectuses of Society—Collateral Agreement—Practice of Society.

The plaintiff was the holder of various policies of assurance on his own life in the Hand-in-Hand Fire and Life Assurance Society, and had obtained loans from the society on the security of his policies. By a prospectus issued by the society at the time when the plaintiff's policies were effected, it was therein stated that loans were promptly made upon the security of the society's policies at 4½ per cent. interest, except when the loan amounted to 200*l.* or more, when the rate was only 4 per cent.

The affairs of the society were regulated by certain rules under which the general management was committed to a board of directors, who had power to invest the funds of the society on mortgage of any life policies. Successive prospectuses were issued by the society containing statements as to collateral matters relating to the policies, but no mention was made as to the rate of interest on loans. As a fact the rate of interest was varied from time to time between 4½ per cent. and 5 per cent. down to 1899. In January, 1905, the undertaking of the society was acquired by the defendant company according to an agreement. From 1921 the defendant company had charged interest at 6½ per cent. and 5 per cent. from August, 1923, to the present time. By the agreement for the transfer to the defendant company that company became liable for all the debts, contracts and engagements of the society, including all the policies and the benefits then attached thereto, and the further benefits in the second schedule mentioned. By that schedule various benefits were secured to the policy holders, and by clause 12 thereof it was stated that the society's policy holders were to be "entitled to all benefits established by the practice or prospectuses of the society, in addition to any benefits conferred by this schedule." The defendant company claimed the right on any further loans being made to the plaintiff to charge a higher rate of interest than 4 per cent., and the plaintiff by his action claimed declarations that they were not so entitled:—

Held, on the facts, that although there was a collateral agreement on other matters, there was no collateral contract or agreement by the society that the rate of interest on loans should not be varied, but be at a uniform rate.

Held, further, that no established practice to charge one uniform rate of interest had been proved, but that it had been the uniform practice to make loans at the rate fixed by the board of directors; and, further, that the benefit claimed had not been established by any prospectus of the society. In the result the action failed on both points, and must be dismissed.

WITNESS ACTION.

The plaintiff, Herbert Edward Thiselton, was originally the secretary and actuary of the Hand-in-Hand Fire and Life Insurance Society, and held nineteen policies of assurance on his life in that society. When these policies were first negotiated in 1895 the society had in public circulation prospectuses stating that loans were granted on the security of the society's policies to very nearly the full extent of their surrender value, and interest was charged half yearly at the rate of 4½ per cent. per annum. In December, 1898, it was determined at a meeting of the board of directors of the society that the rate of interest on such loans should be reduced to 4 per cent. for loans of more than 200*l.*, and the benefit of such reduced rates of interest was extended to all loans on the security of policies, including those issued prior to 1898. At all material times when the plaintiff was negotiating for taking out further policies the society had in circulation the revised prospectuses, which contained words to the following effect: "Loans on policies." "Loans are promptly made upon security of the society's policies to very nearly the full extent of their surrender value. Interest is payable half yearly at the rate of 4½ per cent. per annum, except when the loan amounts to 200*l.* or more, when the rate is only 4 per cent."

The plaintiff alleged that he entered into the contracts of insurance with the society relying upon the statements in the prospectuses, and the policies had all been duly maintained. By a conditional agreement in writing dated December 15, 1904, between the society of the one part and the defendant company (which was registered under the Companies Acts) of the other part, it was agreed that the society should transfer to the defendant company the goodwill of the society's business, and the full benefit of the working organization of the society and all other assets whatever. It was provided by this agreement that the defendant company were to become liable for all the debts, liabilities, contracts and engagements of the society, including all the policies and the benefits attached thereto, and all further benefits in the first and

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second schedules thereunder written. By the second schedule, clause 12, it was provided (inter alia) that in all respects the society's policy holders in every department and of every class should be entitled to all benefits established by the practice or prospectuses of the society in addition to any benefits conferred by that schedule. On June 30, 1905, an Act of Parliament (5 Edw. 7, c. xi.) was passed confirming this conditional agreement. From that date down to November, 1920, the plaintiff had effected loans with the defendant company on the security of his policies to the amount of 8390*l.*, and the rate of interest in respect of all such loans was 4 per cent. per annum. In January, 1921, the plaintiff applied to the defendant company for a further loan on his policies at 4 per cent. per annum. The company refused to make the loan at a rate of interest other than 7½ per cent., reducible to 6½ per cent. if paid within thirty days of due date. The plaintiff declined to effect a loan at that rate.

Subsequently on May 11, 1922, the plaintiff borrowed from the defendants a further sum of 1000*l.* on the security of his policies, but the defendants were only willing to lend this money upon the footing that he should pay interest at 4 per cent. and agree to pay any further rate of interest above that should it subsequently be decided that the defendants could properly charge it. The plaintiff alleged that the defendants claimed the right to refuse to make further loans except at such rate of interest as they might from time to time decide.

The plaintiff then brought his action and claimed :—

(1.) A declaration that the defendant company were not entitled to charge interest at a rate exceeding 4 per cent. per annum on the loan to the plaintiff of 1000*l.* made in May, 1922.

(2.) A declaration that the defendant company were not entitled to increase the rate of interest on the other loans made to the plaintiff beyond 4 per cent. per annum so long as such loans amounted to 200*l.* or more.

(3.) A declaration that the plaintiff is entitled, so long as he is the holder of the policies duly and effectively maintained, to

require the defendant company to lend to him on the security of his policies such sums as he may require at a rate of interest of 4½ per cent. per annum in the case of loans not amounting to 200*l.*, and at 4 per cent. in the case of loans amounting to 200*l.* or more. The defendants, while admitting the main facts in the case, did not admit that the society made any prospectus retrospective, and stated that they were willing at all times to consider applications for loans and to continue loans for amounts falling within the surrender value of the plaintiff's policies at moderate rates of interest having regard to market conditions. The facts as to the conduct of the business of the society and the variations of the rate of interest on loans sufficiently appear from the judgment of the Court.

Maugham K.C., *Spens K.C.* and *F. R. Evershed* for the plaintiff. The two points raised by this action are (1.) whether or no there was a collateral agreement beyond the contents of the policy which entitled the plaintiff to have loans made to him on the security of his policies at 4 per cent. interest, and (2.) whether the defendants when acquiring the undertaking of the society were not bound by the established practice or the prospectuses of the society to grant loans at a uniform rate of interest.

On the first point, when plaintiff's nineteen policies were effected the revised prospectus of the society contained a statement as to loans on policies to be made at 4½ per cent., except when the loans amounted to 200*l.* or more, when the interest would be 4 per cent. There was clearly some agreement between the assured and the society with regard to certain options, and as to the days of grace for the payment of renewal premiums, and other matters not stated in the policy. We submit that the collateral agreement extended also to fixing a uniform rate of interest—namely, 4 per cent.—in respect of all loans.

On the second point in clause 12 of the second schedule to the agreement of December 15, 1904, transferring the assets of the society to the defendants, it was expressly stated that the society's "policy holders were to be entitled to all benefits

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established by the practice or prospectuses of the society." At that date the plaintiff was entitled to the benefit of being able to borrow moneys at any future time on the security of his policies at the fixed rate of 4 per cent.

The rate of interest was no doubt altered on several occasions by the directors of the society before 1905 in respect of new loans, but the prospectus referred to stated the interest at that time to be 4 per cent.

Wilfrid Greene K.C. and *A. Andrewes-Uthwatt* for the defendant company. No such collateral agreement as has been suggested by the plaintiff in regard to a uniform rate of interest at 4 per cent. has been established. There were some other matters of a collateral nature which were provided for outside the policies. Such collateral agreements must be strictly proved: *British Equitable Assurance Co.* v. *Baily* (1); *Heilbut, Symons & Co.* v. *Buckleton.* (2) Nor has any such practice as is alleged been proved by the prospectuses of the Hand-in-Hand Society, or otherwise. Having regard to all the circumstances the rate of interest was in the power of the board of directors, to be settled from time to time.

Cur. adv. vult.

July 6. EVE J. delivered the following written judgment: The plaintiff is the holder of several policies of assurance on his own life issued by the Hand-in-Hand Fire and Life Insurance Society, whose undertaking was acquired by the defendant company in January, 1905. By this action he claims a series of declarations to the effect that, so long as he is the holder of his said policies and such policies are duly maintained and effective, the defendants are not entitled to charge him interest at a higher rate than 4 per cent. per annum on any sums amounting to 200*l.* and upwards already advanced or hereafter to be advanced to him on the security of the policies or any of them.

The claim is founded on the contentions, first, that at the time when each contract of assurance was entered into

(1) [1906] A. C. 35. (2) [1913] A. C. 30, 47.

a collateral agreement was concluded between the society and the assured, whereby the society bound itself to make advances upon the security of the policy to an amount very nearly approaching its surrender value at the rate of interest already mentioned; and, secondly, that if there was in fact no such collateral agreement, the consideration moving from the defendants when they so acquired the society's undertaking included an express term whereby they agreed that the policy holder was to be entitled to all benefits established by practice or prospectuses of the society, and that this uniform rate of interest was a benefit so established.

The salient facts are not in dispute. At the time when the plaintiff's policies were effected there was included in the prospectus for the time being circulated by the society inviting applications for assurances, a statement headed "Loans on policies" in these terms: "Loans are promptly made upon security of the society's policies to very nearly the full extent of their surrender value. Interest is payable half yearly at the rate of 4½ per cent. per annum, except when the loan amounts to 200*l.* or more, when the rate is only 4 per cent." The rates of interest mentioned in the foregoing extract were those charged between January, 1899, and December, 1920. Between June, 1895, and December, 1898, the rate had been 4½ per cent., between May, 1893, and June, 1895, 4½ per cent. on 500*l.* and upwards, 5 per cent. on less than 500*l.*, and prior to May, 1893, 5 per cent. on all amounts. The defendant company has charged interest on loans made on the society's policies at 6½ per cent. for the year 1921, 6 per cent. from January to July, 1922, 5½ per cent. from July, 1922, to August, 1923, and 5 per cent. from the last mentioned date down to the present time.

The affairs of the society and the conduct of its business were regulated by certain rules, regulations and provisions, under which the general management was committed to a board of directors, upon whom was conferred an express power to invest the funds of the society (inter alia) on mortgage of any life policies granted by the society. All the policies were granted subject to the rules, regulations and

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provisions of the society for the time being, but contain no mention of any agreement by the society to make loans upon the security of the policy, although from 1901 onwards there was handed to the assured with his policy a printed table of surrender values whereon appears this note : " The Society will, at any time, lend about 95 per cent. of the surrender value upon security of a first charge on the policy." It is to be noted that nothing is said there about the rate of interest that will be payable.

The existence of some agreement between the society and the assured outside the policy itself cannot be denied. For example, there are to be found in the successive prospectuses issued by the society statements of a precise nature as to the options which the assured may exercise in connection with any reversionary bonuses declared or with the time and manner of the payment (whether in one sum or by instalments or as an annuity) of the sum assured on maturity of the policy —as to the days of grace to be allowed for payment of renewal premiums—as to the half credit system under which one-half only of the premiums during the first five years need to be paid, the other half, with interest at 5 per cent., remaining charged on the policy—and as to surrender values and the terms on which lapsed policies can be revived. All these undoubtedly are terms of a contract between the society and the assured not to be found in the policy ; there is nothing ambiguous or indefinite about them, and they present no aspect calculated to create a doubt whether either party can properly be presumed to have intended so to contract. Finally, they are all directly connected with, and germane to, the main contract, and therefore of a character strictly collateral thereto. Can the same be said of the statement as to loans on the policy and the interest to be charged thereon ? I think not. The principal amount to be advanced is indefinite, the sentence as to interest is in the present tense and a correct statement of an existing fact, not, as I read it, an agreement or even representation that it shall never be varied ; the possible use of the policy for raising money at some future date when it has acquired a surrender value

does not strike me as in any sense pertinent to the immediate contract of assurance; and, lastly, having regard to the fact that the rate of interest earned by the other invested funds of the society is a factor in determining the rate to be charged on loans to policy holders, I cannot infer that the society intended to contract that, however great the disparity, the borrowers on their policies should retain the advantage of being charged an uniform rate throughout. In my opinion, therefore, the plaintiff's claim, so far as it is founded on the allegation of a contract come to with the society when the policies were granted, fails.

His second contention is based upon clause 12 of Schedule II. to the agreement for the transfer to the defendant company of the society's assets and liabilities, confirmed by the Commercial Union Assurance Company, Limited, Act, 1905. By clause 11 of the agreement, which is dated December 15, 1904, the company became liable in place of the society as on January 1, 1905, for all the debts, liabilities, contracts and engagements of the society, including all its policies and the benefits then attached thereto, and the further benefits in the second schedule mentioned. By that schedule substantial benefits, by way of additional bonuses, increased reductions of premium and other concessions, to which it is unnecessary to refer in detail, were secured to the policy holders, and at the end of the enumerated benefits came clause 12, in these words: "In all respects the society's policy holders in every department and of every class are to be entitled to all benefits established by the practice or prospectuses of the society in addition to any benefits conferred by this schedule." The question is: Has the plaintiff made out that the policy holders were entitled on January 1, 1905, by the practice or prospectuses of the society to the benefit of being able to borrow moneys at any then future time on the security of their policies at the fixed rate of 4 per cent. per annum by way of interest? True it is that at the date mentioned the rate of interest was 4 per cent., and had been so from the year 1898, and, in the absence of any difficulty arising on title, loans within the maximum limit were made at that rate

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by the responsible officer of the society without reference to the board of directors and almost as a matter of course. Further, there is no record of any such loan having been called in. By the security taken, interest at 6 per cent., reducible to 4 per cent. on punctual payment, was reserved; the principal moneys were made repayable at the end of six months, and it was provided that the borrower might at any time, without notice, repay the loan either altogether or in instalments of not less than 5*l.*, with interest on the amount repaid to the date of payment.

Do these facts prove an established practice as to the rate of interest? I do not think they do. As would appear from what I have already stated, the rate was varied from time to time, and on three occasions between May, 1893 and 1905, altered by the directors, and if in 1905 one had put to oneself the question: What is the practice with regard to the rate of interest charged? I think the obvious answer would have been: That is fixed from time to time by the resolution of the board. Nor is the accuracy of that answer affected by the fact that when once the only variant in the transaction had been fixed by the board, loans were made in the ordinary routine of business at the rate so fixed. The practice proved is a uniform practice to make loans at the rate fixed by the board, not a practice to charge one fixed rate (maximum or minimum) for all time. Nor, in my opinion, can it rightly be said that the benefit claimed is established by any prospectus of the society. I have already expressed the opinion that the paragraph in the prospectus is an accurate statement of an existing fact, and nothing more. It cannot rightly be regarded as a promise that the existing state will be preserved indefinitely, nor can its meaning and intent be enlarged simply because that state was still the existing state after a lapse of four or five years and continued for another fifteen. I do not think that clause 12 helps the plaintiff. It has been accurately referred to as in the nature of a saving clause intended to sweep in any possible benefit or privilege to which the policy holder as such was entitled, but which from oversight or otherwise had not been specifically dealt with. It

may well be that the privilege of borrowing so large a proportion of the surrender value of the policy, and the right to pay off the loan without notice and by small instalments, were swept in by it; but these are considerations outside the present controversy, and, having come to the conclusion that neither by contract nor by this clause can the plaintiff establish his claim in this action, I have no alternative but to dismiss it with costs.

Solicitors: *Cameron, Kemm & Co.; Coward, Chance & Co.*

G. M.

GARNETT *v.* PRATT.

[1925. G. 2182.]

Inclosure—Award—Liability to repair and maintain Fences—Power of Commissioners to direct Maintenance of Fences—Ultra vires—Omission from Inclosure Act of Power to direct Maintenance of Fences—Implied Power—Inclosure Act, 1836 (6 *&* 7 *Will.* 4, *c.* 115), *ss.* 26, 27, 32—*Inclosure Act*, 1845 (8 *&* 9 *Vict. c.* 118), *s.* 83.

Notwithstanding the omission from the Inclosure (Lord Worsley's) Act, 1836, of an express power for the Commissioners to direct the repair and maintenance of the fences, the erection of which by the respective allottees of land that Act empowers them to direct, such a power is nevertheless conferred upon them by the Act by implication.

WITNESS ACTION.

The plaintiff, Garnett, was the owner of a farm known as Mid Widdale in the township of Hawes in the North Riding of the county of York, part of whose farm comprised the parcel of common pasture field formerly allotted to his predecessor in title under the Inclosure Award hereinafter mentioned, his co-plaintiff being the yearly tenant of the said farm. The defendant Pratt was the tenant of the adjoining farm known as Widdale Farm, in the same township of which the other defendants, Webb and Whately, were the owners, part of whose farm comprised the parcel of common pasture field formerly allotted to their predecessor in title under the same award.

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By an award made on March 22, 1859, under the Inclosure (Lord Worsley's) Act, 1836, the Commissioner thereunder (amongst other allotments set out and awarded by him to the several persons interested in certain cattlegaits, stints, shares rights of common and other rights in the open common stinted pasture field known as "Green Scarr Pasture" at Hawes) set out and allotted to one Robert Blenkhorn, the predecessor in title of the plaintiff, Garnett, in respect of his cattlegaits and other rights in "Green Scarr Pasture," 149a. 1r. 9p. being parcel thereof and No. 4 on the plan annexed to the award. By the same award there was also set out and allotted to one Robert Metcalfe Atkinson the predecessor in title of the defendants Webb and Whately, in respect of their rights in "Green Scarr Pasture," 182a. 1r. 29p., being other parcel thereof and No. 6 on the same plan; and the parcels of ground so allotted were to remain and accrue to those allottees their respective heirs and assigns in full satisfaction of their respective cattlegaits and other rights. By the award the allottee of the parcel of ground No. 4 was directed to make and for ever thereafter maintain certain fences on the boundaries thereof, and the allottee of the parcel of ground No. 6 was directed to make and for ever thereafter maintain (in addition to other fences) a good and sufficient fence on the whole of the south-west side adjoining the allotment No. 4 on the plan; and the award also contained a general direction that the several parcels of ground thereby allotted should within the space of two years after the award be inclosed, walled, fenced and ditched at the proper expense of the several persons to whom the same were respectively allotted and awarded their several and respective heirs, executors, administrators and assigns according to the natures and tenures thereof respectively and that the inclosures and fences should at all times for ever thereafter be by them repaired and maintained in such manner as was thereinbefore mentioned.

In accordance with the directions contained in the award a wall was erected by the original allottee of the allotment No. 6 in height about 5 feet, extending a distance of 847 yards,

which separated that allotment from the adjoining allotment No. 4. That wall, as the Court found on the evidence adduced at the trial, had been allowed to fall into disrepair, and the tenants of the respective allotments had for a period of twenty years or more each acquiesced in the sheep of the other straying through the gaps in the wall and grazing upon his allotment. Disputes had recently arisen between the owners and tenants on either side of the boundary wall as to which of them were liable to put the wall into a proper state of repair, which culminated in this action by the owner of the allotment No. 4 and his tenant against the owners of the allotment No. 6 and the defendant Pratt, their tenant, asking for a declaration that the defendants, the owners of the allotment No. 6, were, and as from the commencement of his tenancy or occupation, the defendant Pratt was, bound to rebuild, repair and maintain the wall or to erect, repair and maintain on the site of such wall a good and suitable wall sufficient to turn cattle and sheep, and also a mandatory order to rebuild such parts of the wall as were decayed or had been destroyed.

There was a counterclaim by the defendants against the plaintiffs for damages by trespass.

The Inclosure Act of 1836, by s. 26, authorized Commissioners to apportion divide and allot the lands authorized by the Act to be divided allotted and inclosed amongst the several proprietors thereof and the persons interested therein in proportion to their respective shares, rights of common and all other rights and interest in lieu and full satisfaction thereof to be ascertained and adjusted by such ways and means as to the Commissioners should seem just and expedient. By s. 27, it was provided that at the desire of the proprietors or persons interested their several allotments might be set out together in one plot by the Commissioners, distinguishing the portion of such plot allotted to each of such proprietors by metes and bounds, but without their being required to make any subdivision or other fences, save ring or outer fences for dividing the plot from the residue of the lands to be inclosed. And by s. 32 of the same Act, Commissioners were empowered to apportion the expenses of erecting

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boundary fences by ordering any proprietor having a less proportionable quantity of boundary fences than another to contribute a sum of money towards making the fences of the allotments of such other proprietor.

By s. 83 of the Inclosure Act, 1845, allotments to be made under the authority of that Act were to be fenced at the expense of the respective persons to whom the same should be allotted in such manner as the valuer should direct, and the fences so to be made "shall for ever afterwards be repaired and maintained by such persons as the valuer shall direct."

J. M. Paterson for the plaintiffs. Even if the Act of 1836 contains no express power for the Commissioner to direct the repair and maintenance of the fences, such a power may be implied. After the lapse of so many years it is too late for the defendants to impeach the award as being ultra vires, and to contend that the Commissioner had no power to direct the maintenance of the fences: *Micklethwait* v. *Vincent* (1), where the defendants claimed a right to shoot and fish over Hickling Broad, and they sought, notwithstanding the lapse of ninety years, to impeach the award on the ground that the Commissioners had no power under a local Inclosure Act of 1801 to allot any part of the Broad itself, and it was held that it was too late to disturb the award even assuming it were ultra vires.

G. D. Johnston for the defendants, the present owners of allotment No. 6. Those defendants as owners are not liable for the repair of the wall. No power was conferred by the Inclosure Act of 1836 on the Commissioner to direct the allottees of land to keep the fences in repair. The Inclosure Act, 1845, did, in regard to allotments then to be made under that Act, expressly supply a power for the valuers to give directions as to the repair and maintenance of the fences: see s. 83 of that Act. The decision in *Micklethwait* v. *Vincent* (1) has no application to the circumstances of the present case, which differ from those in the case cited. There

(1) (1893) 69 L. T. 57.

the plaintiff had entered under the award and had been in the undisputed possession and enjoyment of the awarded rights over Hickling Broad for ninety years, and the point as to ultra vires became crucial at the date of entry. Moreover, the objection went to the whole award. But here the point as to repair is raised for the first time, and neither side has, so far, acquiesced in the award quoad repair, which is a very minor part of the award. Further, the defendant owners are under no liability to repair, because they have not been in occupation, the liability to repair arising ratione tenurae: *Cuckfield Rural Council* v. *Goring*. (1)

Beebee for the defendant Pratt adopted the last argument.

LAWRENCE J. This case is an unfortunate one for the parties, as the cost of ascertaining their rights will far exceed the value of the subject matter in dispute. At the same time the action does raise a question of some general importance as to the liability of a landowner to repair fences directed to be erected under an award made pursuant to the statute 6 & 7 Will. 4, cap. 115.

The actual point to be decided is, on whom falls the liability to repair the length of wall which lies between the two points which have conveniently been marked A and B on the Ordnance map. There would be nothing out of the common in this case, but for the fact that the two tenants of the properties lying on each side of the wall had been friends for many years and had allowed the wall to get into a very bad state of repair, with the result that the sheep of each tenant had acquired the habit of straying on to the land of the other without objection. Now, the tenants have fallen out, and the Court has to decide who is legally liable to restore the wall to its proper condition as a boundary fence.

The wall stands on the land of the defendants, and in the past has from time to time been partially patched and repaired by them. In this action, however, the defendants deny all liability to repair and say that, if the plaintiffs want a

(1) [1898] 1 Q. B. 865.

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boundary fence between their land and the defendants', they ought to erect such a fence on their own land and at their own expense.

This brings me to the point whether the direction contained in the award is one which can now be enforced at the instance of the plaintiffs. The award directed the predecessor of the defendants to erect the wall and for ever after to maintain it in a proper condition. It has been forcibly contended by Mr. Johnston that the Commissioner who made the award was acting ultra vires, in so far as he gave directions for the maintenance of the wall. In support of this contention he has referred me to the Commons Inclosure Act, 1845, which by s. 83 confers an express power upon the valuer to give a direction in his award as to the persons who are to maintain the fences, and contended that in the absence of such a provision in the Act of 1836, the Commissioner in the present case had no such power.

In my opinion this contention is not well founded. By s. 26 of the Act of 1836, the Commissioner is to apportion, set out, divide and allot the land to be inclosed. It is clear from ss. 27 and 32 that the duty so cast upon the Commissioner implies a power in him to order fences to be made for dividing the land allotted by him. It is true that in these sections nothing is said about maintaining the fences after they have been erected. In my judgment, however, it follows from the authority which was conferred upon the Commissioner to divide the lands and to order fences to be made that he had power to direct by whom the fences were to be maintained. Such a power, in my opinion, must be implied as incidental to the division and allotment of the lands to be inclosed. It would be strange if, after the Commissioner had ordered a number of fences to be erected, the persons upon whom this obligation had been laid could, after they had erected the fences, have pulled them down again or let them fall into disrepair, with the result that their neighbours would for their own protection have to erect fences on their own land. The Legislature in 1845

no doubt considered it advisable to make an express enactment on the subject; but that fact does not, in my opinion, prove that there was no implied power under the Act of 1836.

In the result, I have come to the conclusion that, although not expressed, an implied authority is by the Act of 1836 conferred upon the Commissioner to direct who are the persons to keep the wall in question in repair. By the award the obligation to repair is laid upon the persons to whom the parcels of ground are respectively assigned, set out, allotted and awarded their several and respective heirs, executors, administrators and assigns according to the natures and tenures thereof respectively. Mr. Johnston further contended that under that direction the present owners are not under any liability, because they are not in occupation. In support of this contention he cited the case of *Cuckfield Rural Council* v. *Goring*. (1) In my judgment, the decision in that case does not apply to the present case. There the Court was dealing with the liability created under s. 25, sub-s. 2, of the Local Government Act, 1894, by which it was enacted that, where a highway repairable ratione tenurae appears not to be in proper repair and the person liable to repair the same fails when requested so to do, the District Council may repair it, and it was held that the person who was liable to repair the highway was the occupier and not the owner. In the present case the award imposes a direct obligation upon the original allottees and their heirs, executors, administrators and assigns, and the liability arises under this direction, which has statutory force by virtue of the Act of 1836. The defendants are the assigns of the original allottee, and therefore are persons upon whom the obligation is imposed in express terms; consequently it is not necessary to embark upon the question which arose in *Cuckfield Rural Council* v. *Goring* (1), whether the liability to repair attaches to the owner or the occupier.

For these reasons I have come to the conclusion that, as between the plaintiffs on the one hand and the defendants

(1) [1898] 1 Q. B. 865.

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on the other, the defendants Webb and Whately are the persons on whom the obligation to repair rests, and the plaintiffs are entitled to have a declaration to that effect. As, however, there may be some arrangement between the defendant Pratt and the defendants Webb and Whately as to the repair of the wall, the declaration will be without prejudice to any question between the defendants inter se.

[The counterclaim failed and was dismissed with costs.]

Solicitors: *Golding, Hargrove & Golding, for Holden & Wilson, Lancaster; Maude & Tunnicliffe, for Willan & Metcalfe, Hawes, Yorkshire; Jenkinson, Meyler & Campbell.*

H. C. H.

TOMLIN J. 1926 *March* 26, 29, 30; *April* 13, 14; *June* 1.

BOOTH *v.* AMALGAMATED MARINE WORKERS' UNION.

[1925. B. 1569.]

Trade Union—Amalgamation—Condition precedent—Ballot of Constituent Union irregularly conducted and requisite Votes not obtained—Invalid Amalgamation—Effect of Registration—Funds of constituent Union—Rights in respect of them—Trade Union Act Amendment Act, 1876 (39 & 40 *Vict. c.* 22), *ss.* 12, 13—*Trade Disputes Act*, 1906 (6 *Edw.* 7, *c.* 47), *s.* 4—*Trade Union (Amalgamation) Act*, 1917 (7 & 8 *Geo.* 5, *c.* 24), *s.* 1.

No statutory power for two unions to amalgamate is conferred by the Trade Union Act Amendment Act, 1876, s. 12, as amended by the Trade Union (Amalgamation) Act, 1917, s. 1, except subject to the condition precedent contained therein as to holding a ballot of each constituent union at which 50 per cent. at the least of the members vote and the votes in favour of amalgamation exceed by at least 20 per cent. the votes against it.

Although under s. 13 of the Act of 1876 notice in writing of an amalgamation must be sent to the Registrar and registered, and until this is done, the amalgamation does not take effect, yet an amalgamation which is rendered invalid by reason of a failure to comply with the above condition precedent is not validated by registration of the notice nor is the registration of such a notice conclusive of the validity of the amalgamation.

When funds of a constituent union have been handed to what purports to be a union formed by the amalgamation of this union with another

constituent union, but the amalgamation is invalid, the amalgamated union holds any part of those funds remaining in its hands as trustees for the members of the constituent union, and will on their application in a representative action be restrained from dealing with these funds; and the Trade Disputes Act, 1906, s. 4, affords no defence to a claim for this relief.

WITNESS ACTION.

The facts, which are fully stated in the judgment, were briefly as follows:—

The plaintiff was a member of a trade union called the National Union of Ships' Stewards, Cooks, Butchers and Bakers (hereafter referred to as the "Stewards' Union"), and sued on behalf of himself and all other members of that union. The defendants were a trade union (hereafter referred to as the "Amalgamated Union") registered as an amalgamation of the Stewards' Union and another trade union called the British Seafarers' Union.

During the autumn of 1921 negotiations took place between Committees of the Stewards' Union and British Seafarers' Union with a view to amalgamation, and it was decided to take a ballot upon the question of amalgamation. The Stewards' Union purported to hold a ballot, and on December 29, 1921, the result of the ballot was announced, and an agreement for amalgamation signed. Soon afterwards a notice of amalgamation, a request for registration of the Amalgamated Union and a statutory declaration by the General President of the Stewards' Union, Joseph Cotter, to the effect that the provisions of the Trade Union Act, 1876 and 1917, in regard to an amalgamation, had been complied with, were sent to the Chief Registrar of Friendly Societies, and on February 1, 1922, the Amalgamated Union was registered. The assets of the Stewards' Union, amounting to over 76,000*l.*, were about this time transferred to the Amalgamated Union.

The plaintiff now alleged that the ballot of the Stewards' Union was irregularly conducted and void, and that the statutory number of votes required by the Trade Union Act Amendment Act, 1876, s. 12, as amended by the Trade Union (Amalgamation) Act, 1917, were not recorded thereat.

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The grounds on which he alleged that the ballot was void were :—

(*a*) That the ballot was not kept open for a sufficient time to afford all members entitled to vote an opportunity of doing so.

(*b*) That when it was found, after the ballot was supposed to have closed, that the statutory number of votes had not been recorded, the ballot was informally opened again for a further period of seven days and further ballot papers distributed without inquiring whether the recipients had voted, with the result that many members voted more than once.

(*c*) That, even so, the statutory number of votes were not recorded.

The plaintiff therefore claimed a declaration that the purported amalgamation was null and void; an injunction to restrain the Amalgamated Union from dealing with the property and assets of the Stewards' Union otherwise than in accordance with the directions of that Union; and consequential and other relief.

The Amalgamated Union claimed that all the statutory requirements as to ballot were duly carried out, but that, in any case, the union was a duly registered trade union by virtue of the certificate of registration of the Registrar of Friendly Societies and a valid amalgamation of the Stewards' Union and the British Seafarers' Union, and that this certificate was conclusive as to the validity of all steps leading to the amalgamation. The defendant union also relied on the Trade Disputes Act, 1906, s. 4, as a defence to any liability in respect of the funds of the Stewards' Union, and also contended that the Union was a purchaser without notice and could not be disturbed in the possession of these funds so far as not already expended, and that the plaintiff was debarred from maintaining the action by reason of having been an officer and member of the Amalgamated Union.

Evidence was called by the plaintiff in support of the action, the effect of which sufficiently appears from the judgment. No evidence was called by the defendant Union.

Gavin Simonds K. C. and *Roxburgh* for the plaintiff. Under the Trade Union Act Amendment Act, 1876, ss. 12 and 13, as amended by the Trade Union (Amalgamation) Act, 1917, it is a statutory condition precedent to the amalgamation of two trade unions that 50 per cent. of the members of each of the amalgamating unions should vote on the question of amalgamation, and that of those voting those in favour of amalgamation should exceed by at least 20 per cent. those voting against it. Here there was no proper ballot, because it was held under conditions such that a large number of the members of the Stewards' Union had no opportunity of voting while others voted more than once. Further, even on the votes recorded an insufficient number of members voted. Moreover, in order to cover up the insufficiency of the votes, a false return of the members of the Stewards' Union at the end of 1921 was made by the direction of the president, Cotter, understating the membership by many thousands. The ballot was intended to be kept open for two months, but in fact ballot papers were being sent out until two days before it was intended to close the ballot, and the evidence is that, even so, there were many members who never received ballot papers. The only indication in the rules of the union as to the period for which a ballot should be kept open is in r. 7 (2.), which provides that a ballot for the election of officers is to be kept open for three months. In a matter so vital as amalgamation it is reasonable to think that at least this period of time should have been allowed.

It will be suggested that it is immaterial that the condition precedent to amalgamation was not complied with, because the registration of the Amalgamated Union by the Registrar is conclusive. The duties of the Registrar are however purely ministerial: *Reg.* v. *Registrar of Friendly Societies.* (1) Further, the plaintiff is not concerned to say that the Amalgamated Union is not a registered trade union, but only that the Stewards' Union and the British Seafarers' Union are not amalgamated in it. The registration of an invalid amalgamation does not validate it. Thus the registration of an invalid

(1) (1872) L. R. 7 Q. B. 741.

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rule does not validate it: *Osborne* v. *Amalgamated Society of Railway Servants.* (1) Further, under s. 13 of the Trade Union Act the only thing as to which the register is conclusive is the registration of a trade union, and that the regulations with regard to registration have been complied with. Under s. 12 of the Act of 1876, as amended by the Act of 1917, there can be no amalgamation without compliance with the statutory condition precedent, and if it has not been complied with no registration can affect the matter.

Then if there has been no valid amalgamation the Amalgamated Union have no right to the funds of the Stewards' Union, and the plaintiff is entitled to an injunction to restrain the Amalgamated Union from dealing with any of the funds still in their possession and an account: *Yorkshire Miners' Association* v. *Howden* (2); *Sheet Iron Workers' and Light Platers' Society* v. *Boilermakers' and Iron and Steel Shipbuilders' Society.* (3)

A question will arise as to what ought to be done with the funds ascertained on the taking of the account to be in the hands of the Amalgamated Union as trustees for the members of the Stewards' Union. Probably it will be right to have the amount brought into Court.

The defence indicates that the defendants propose to rely on the Trade Disputes Act, 1906, s. 4, but the plaintiff is not suing the union here for a tortious act, but is simply claiming that the union have funds in their hands as trustees for the Stewards' Union, and are liable to account to their beneficiaries. The plaintiff is waiving the tort, as he is entitled to do, and simply asking to recover money remaining in the defendants' hands.

Sir H. Slesser K.C. and *A. Henderson* for the defendant union. As the result of the registration of the Amalgamated Union that body came into existence, and it is admitted that its existence cannot now be questioned. But the coming into existence of the Amalgamated Union and the amalgamation are so inextricably mixed that if one is valid so also

(1) [1909] 1 Ch. 163, 182; [1910] A. C. 87.
(2) [1905] A. C. 256.
(3) (1924) 40 Times L. R. 294.

must the other be valid, and regard cannot be given to the fact that any condition precedent to amalgamation was not complied with. The registration of unions was first provided for in the Trade Union Act, 1871, ss. 6, 13, 14, and certain benefits accrued to registered unions: see ss. 8, 9; and by s. 2 of the Trade Union Act, 1913, any combination from time to time registered as a trade union is to be deemed to be a trade union so long as it remains registered. Here the Amalgamated Union came into existence as the result of an amalgamation under the Trade Union Act Amendment Act, 1876, ss. 12 and 13, and the registration not only recognizes the existence of the union, but also that it has arisen through an amalgamation. Therefore the registration of the Amalgamated Union is conclusive while it continues that an amalgamation has taken place.

[TOMLIN J. By the Trade Union Act, 1871, s. 13, the certificate of registration is only conclusive to prove compliance with the necessary requirements for registration, may it not be found that the amalgamation was improper, and that the registered union is not therefore entitled to the funds of the Stewards' Union ?]

The statutes provide two modes of obtaining registration. The first is on an original application under s. 6 of the Act of 1871, and the second is on an amalgamation under s. 12 of the Act of 1876. Here the documents which brought about registration were those appropriate to an amalgamation, and if the registration of the Amalgamated Union stands, so also must the amalgamation that produced it. By the Trade Union Act, 1876, s. 13, it is the registration of the notice of writing of amalgamation which effects the amalgamation, and the Court must infer that all the conditions required by s. 12 have been complied with.

[TOMLIN J. That depends on the language of the section which makes the certificate of registration conclusive.]

In *Osborne* v. *Amalgamated Society of Railway Servants* (1) Fletcher Moulton L.J. pointed out that by s. 13 of the Act of 1876 registration is given a statutory effect, and is made essential to the validity of the acts to which it relates and

(1) [1909] 1 Ch. 163, 182; [1910] A. C. 87.

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he contrasts it with the provision in regard to the rules of a union. The certificate of registration of the union being conclusive it must, where the union has been brought into existence as the result of an amalgamation, be conclusive as to the amalgamation also. The Amalgamated Union can have no existence if the amalgamation be invalid. Rule 1 of the Amalgamated Union recognizes that it is an amalgamation of the Stewards' Union and the British Seafarers' Union, so that it came into existence as such. The effect of registration is that the Court cannot consider previous circumstances affecting its validity: compare *Reg.* v. *Registrar of Friendly Societies* (1); *Dewhurst* v. *Clarkson* (2); *Rosenberg* v. *Northumberland Building Society.* (3)

Again even if there was no valid amalgamation, the Amalgamated Union is entitled to retain the funds transferred to it from the Stewards' Union. For even if the transfer of those funds constituted a breach of trust, the Amalgamated Union is in the position of a purchaser for value without notice. The Amalgamated Union has given valuable consideration by taking over the liabilities of the Stewards' Union. A trade union is to this extent a separate entity, that it can enter into an agreement: *McLuskey* v. *Cole.* (4) Thus the Amalgamated Union had no notice of the breach of trust. The fact that Joseph Cotter, the president of the Stewards' Union, made false returns does not affect the Amalgamated Union with knowledge of this, even though Cotter afterwards became general president of the Amalgamated Union.

In any case the plaintiff Booth cannot sue in respect of this breach of trust, for he has acted as an official of the Amalgamated Union, and by receiving payments from it has enjoyed the fruits of the alleged breach. The plaintiff therefore has no right of action personally, and he cannot improve his position by suing in a representative capacity: Order XVI., r. 11; *Ayscough* v. *Bullar* (5); *Roberts* v. *Holland.* (6)

(1) L. R. 7 Q. B. 741, 746.
(2) (1854) 3 E. & B. 194.
(3) (1889) 22 Q. B. D. 373, 379.
(4) [1922] 1 Ch. 7, 18, 19.
(5) (1889) 41 Ch. D. 341.
(6) [1893] 1 Q. B. 665.

Finally this action is not maintainable, because either the Trade Disputes Act, 1906, s. 4, or the Trade Union Act, 1871, s. 4, affords a complete answer. This action is either based on tort or contract. Seemingly it is an action for tortious conversion of funds. It is said that the trustees of the funds of the Stewards' Union paid over these funds to the Amalgamated Union improperly. Their retention and conversion by the Amalgamated Union is thus a tortious act, and the plaintiff is suing the Amalgamated Union in respect of it. Such an action is not maintainable: Trade Disputes Act, 1906, s. 4.

[TOMLIN J. Trust funds which come into any stranger's hands always remain trust funds, unless they come into his possession without knowledge of the trust.]

Even so their conversion would be a tortious act: Lewin on Trusts, 12th ed., p. 1150.

[TOMLIN J. The plaintiff is making no complaint as to money expended, but only asking for payment over of money remaining in the union's possession.]

Sect. 4 refers to a tortious act, and this is something wider than a tort: see *Ware and de Freville, Ld.* v. *Motor Trade Association.* (1) If on the other hand it be said that the action is founded on contract then the Amalgamated Union is protected by the Trade Union Act, 1871, s. 4.

Gavin Simonds K.C. in reply.

June 1. TOMLIN J. delivered the following written judgment: This is an action in which one Clarence Booth, on behalf of himself and all other members of the National Union of Ships' Stewards, Cooks, Butchers and Bakers, seeks against the defendant union, called the Amalgamated Marine Workers' Union, a declaration that an amalgamation alleged to have taken place between the first named union (which I will call the "Stewards' Union") and a third union called the British Seafarers' Union, which led to the formation and registration of the defendant union, was null and void, and other relief directed to recovering any property representing

(1) 1921] 3 K. B. 40, 75.

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the assets of the Stewards' Union remaining in the hands of the defendant union.

Sect. 12 of the Trade Union Act Amendment Act, 1876, as amended by the Trade Union (Amalgamation) Act, 1917, relates to amalgamations, and reads as follows: "Any two or more trade unions may, if in the case of each or every such trade union on a ballot being taken, the votes of at least 50 per cent. of the members entitled to vote thereat are recorded, and of the votes recorded those in favour of the proposal exceed by 20 per cent. or more the votes against the proposal, become amalgamated together as one trade union, with or without any dissolution or division of the funds of such trade unions, or either or any of them; but no amalgamation shall prejudice any right of a creditor of either or any union party thereto." Sect. 13 of the Act of 1876 further provides as follows: "Notice in writing of every change of name or amalgamation signed, in the case of a change of name, by seven members, and countersigned by the secretary of the trade union changing its name, and accompanied by a statutory declaration by such secretary that the provisions of this Act in respect of changes of name have been complied with, and in the case of an amalgamation signed by seven members, and countersigned by the secretary of each or every union party thereto, and accompanied by a statutory declaration by each or every such secretary that the provisions of this Act in respect of amalgamations have been complied with, shall be sent to the central office established by the Friendly Societies Act, 1875, and registered there, and until such change of name or amalgamation is so registered the same shall not take effect."

The case made by the plaintiff is that the impeached amalgamation was bad, because (*a*) although the officials of the Stewards' Union affected to take a ballot of the members of that union, the ballot was no true ballot within the statute, or at any rate the result of the ballot did not comply with the requirements of the statute; and (*b*) that the taking of a proper ballot with a result conforming with the

requirements of the statute is a condition precedent to the validity of an amalgamation.

As its name indicates the Stewards' Union was one for men who followed at sea the several callings indicated in its title. It was a union which had been in existence for some years. Its headquarters were at Liverpool. The number of its members at the beginning of the year 1921 was certainly over 25,000, and at the end of the same year its general administration fund amounted to 74,874*l*. At all material times one Joseph Cotter was its general president.

As is not unusual in organizations of this character the rules of the Stewards' Union are obscure, and the government of the union seems to have been in the hands of a body called the National Executive Council or Committee, over which the members had little, if any, control. The contribution of a member in 1921 was a shilling per week up to August, 1921, and thereafter 9*d*. per week.

By clause 6 of rule 4 of the rules it was provided that any member six months in arrears should cease to be a member of the union, except where covered by clause 4 of the same rule, which in effect exempted from clause 6 members at sea having paid up their contributions to the date of their ship's departure. There was no rule regulating the taking of a ballot under s. 12 of the Trade Union Act, 1876, or providing who should be entitled to vote in any such ballot or indeed in any ballot, except in the case of ballots for the election of officials. Any such last mentioned ballot was by clause 2 of rule 7 to be open for not less than three months, and on the election of general officials as distinct from branch officials the ballot was to be by the whole of the members. The rules also provided for sick and other benefits, and for the division of the funds among the members on dissolution.

In the autumn of 1921, at the instance of the national executive committee of the Stewards' Union, negotiations took place between the Stewards' Union and the British Seafarers' Union (which was a smaller union) with reference to a scheme for amalgamating the two unions and forming a new union to embrace the members and take over the

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assets of both unions. Ultimately at a meeting on October 7, 1921, of a joint committee consisting of representatives of the two unions appointed by the respective executive committees of such unions, a draft agreement for amalgamation was considered. As appears from the minutes of the meeting such draft agreement, as ultimately approved by the meeting, contained the following provisions. Clause 1: "It is agreed that the respective executive councils take steps to form an Amalgamated Marine Workers' Union"; clause 3: "The joint committee shall draw up and submit to the joint national executive councils draft rules and constitution, etc., necessary for the government of the Amalgamated Marine Workers' Union, and shall draft the ballot paper re amalgamation"; clause 12: "All assets and liabilities of the amalgamated unions to be transferred to the Amalgamated Marine Workers' Union"; and clause 13: "A ballot on the proposed draft rules and constitution to be open for a period not exceeding two months, the ballot to be taken by methods to be determined by the respective organisations."

On October 12, 1921, at a further meeting of the joint committee, the form of the ballot paper was discussed, and "Messrs. Williams, Cotter and Lewis were then instructed to draft the ballot paper and issue it forthwith, to be returnable on December 12." A ballot paper was accordingly prepared, and was ready about October 19. The form of ballot paper contained by way of a preamble a general statement of what was proposed, and then provided appropriate spaces for marking a cross either for or against amalgamation. There was nothing on the form of ballot paper by which the voter, after the paper had been filled in, could be identified. It was stated on the ballot paper that it was to be returned not later than Monday, December 12, 1921. The names of the members of the Stewards' Union, with their addresses, were recorded on cabinet cards kept at the head office in Liverpool, and about October 19 the staff at the head office began to address envelopes to those of the members whose cabinet cards showed that they were not twenty-six weeks in arrear with their subscriptions, and such envelopes were sent out

to the members as they were addressed, containing a ballot paper and an envelope for the return of the ballot paper, on which last mentioned envelope was marked an initial letter identifying the branch to which the member belonged. Beyond this initial letter on the envelope for return there was nothing which, on the return of the ballot paper, would give any clue to the voter. The process of addressing and sending out these ballot papers proceeded more or less continuously during several weeks, and was not completed on December 10, when it was abandoned. It was abandoned, although ballot papers had not been sent out to all the members, for the reasons explained by one of the witnesses in these words: "I understood we had closed because we were about two days off the closing of the ballot." It is clear, therefore, that ballot papers were not posted to all the members, and that, as a substantial proportion of members were always at sea on voyages of varying durations, some members to whom papers were posted had probably no reasonable chance of receiving them and returning them by the date indicated on the ballot paper. The rules themselves give an indication of what is a reasonable time to keep a ballot open in this union, having regard to the occupations of the members. The time mentioned in the rules is three months. In this so called ballot in question, no one had as much as two months to make his return, some cannot have had two days, and many had no opportunity of voting at all. After December 12, when the ballot was to close, the officials who were promoting the amalgamation appear to have been dissatisfied with the response which was being made, and accordingly a bundle of blank ballot papers was dispatched to each branch secretary with instructions to get members who had not voted to vote, and on December 21, 1921, the joint committee agreed that the count should take place on December 28, no doubt in order to allow of these ballot papers being filled up and returned. The ballot papers sent to the branch secretaries, so far as they were filled in, were returned in bundles to the head office. The secretaries, in getting them filled up, had no check upon

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voters, and could not tell whether a man who filled up a ballot paper had voted before or not. I have little doubt that many of the branch secretaries did their best to get these ballot papers honestly and fairly filled in, but I have had evidence, which I cannot reject, from one Cairns, the secretary of the Glasgow branch, to the effect that, having received his own ballot paper and voted, he, in December, 1921, received a bundle of blank ballot papers from headquarters, and that he, having already voted himself, personally filled up about 200 of these papers on the footing of one against amalgamation for every five in favour of it (adopting this procedure apparently in order to give an air of verisimilitude to what he was doing), and returned the papers so filled in to headquarters, where they were no doubt included in the count.

On December 29, 1921, the ballot papers returned to headquarters by the means which I have indicated having been counted, the result was announced by the joint committee as being as follows—namely, so far as the Stewards' Union was concerned 4466 votes in favour of amalgamation, 251 votes against amalgamation, 10 voting papers spoilt, and 125 papers returned, meaning presumably returned through the post as not having been delivered; and so far as the British Seafarers' Union was concerned 2003 votes in favour of amalgamation, 30 votes against amalgamation, and 12 votes spoilt.

On the same day the agreement for amalgamation, of which the draft had been approved, appears to have been signed by Cotter and others affecting to represent the two unions. In the absence of information as to the British Seafarers' Union, no question is raised by the plaintiff as to the validity of the ballot of that union.

On the same day, or within a day or two, the necessary notice of amalgamation and a request for the registration of a new union, to be called the Amalgamated Marine Workers' Union, was signed by seven members and the secretary of each of the two unions, the signatories including in the case of the Stewards' Union Cotter and one Mollan, to whom

I shall refer later. The notice and request so signed, together with a statutory declaration by Cotter to the effect that the provisions of the Acts of 1876 and 1917 had been complied with, were sent to the Chief Registrar. The notice and the new union were apparently respectively registered on or about February 1, 1922. The name of the Stewards' Union remained on the register. Cotter became first president of the new union, and other officials of the old unions filled posts in the new union.

Towards the end of the month of January, 1922, it became necessary to make to the Registrar in respect of the Stewards' Union the annual return as to officers, members, and funds for the year ending December 31, 1921, and one Mollan, who was secretary and acting treasurer of the union, was instructed to prepare the return. He accordingly got out from the materials available the numbers of the members of the Stewards' Union, showing the numbers at the beginning of the year 1921 and the numbers admitted and leaving respectively during the year, and filled in the form which he obtained from the Registrar for the purpose with these figures. He says that this form, after its rejection by Cotter as hereafter mentioned, was placed in the safe of the Stewards' Union, and with the safe was taken possession of by the defendant union, but it has not been forthcoming. This witness further says that the number of members shown on this form as prepared by him was 20,000 odd, but that when he took the form to Cotter for his signature the latter rejected these figures and supplied figures of his own, which Mollan, upon his instructions, put upon a new form obtained for this purpose from the Registrar and sent to the Registrar. In regard to this incident, I have assumed in favour of the defendant union that Mollan's evidence as to what Cotter said is not evidence against them, though if it were necessary to do so I should rule that it was admissible. The figures on the return thus prepared and sent in were remarkable. They showed 25,970 members at the beginning of the year, 1600 joining members, and 17,770 leaving members, so that the net figure appeared as 9800 members. It is to be

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observed, however, that even this figure, if correct, and if the proper figure of membership to regard for determining whether at least 50 per cent. of the members recorded their votes in the ballot, is too high to validate the ballot.

As a matter of fact, the evidence adduced on behalf of the plaintiff satisfies me that at every material time the membership of the Stewards' Union far exceeded in numbers any figure of which the votes recorded at the ballot could have been 50 per cent. I need not examine the evidence in detail. There is some direct evidence from cabinet cards and other records, and there is indirect evidence corroborative of the direct evidence.

Cotter was not called. I am told he is in America. The defendant union did not see fit to adduce any evidence at all, and upon the material before me I am satisfied and hold: First, that the ballot was not so conducted as to give a reasonable opportunity to the members as a whole to vote, and was in fact so conducted as not to constitute a real ballot of the members of the union; Secondly, that on the ballot the votes of 50 per cent. of the members were not recorded; and thirdly, that the declaration made by Cotter that the provisions of these Acts had been complied with and the subsequent return as to the members of the Stewards' Union were respectively false. I arrive at these conclusions apart altogether from the admissions contained in a letter written by Cotter as president of the defendant union, and dated April 16, 1925.

The precise number of members of the two old unions who became members of the defendant union is not proved, but the number appears to have been small. At an early period of the year 1922 the defendant union, being under the control of Cotter and other officials who had carried through the so called amalgamation, took possession of all the respective assets of the Stewards' Union and the British Seafarers' Union, amounting in value in the case of the Stewards' Union to not less than 75,000*l.*, and as appears from the general account of the defendant union for the year ending December 31, 1922, those assets began rapidly to melt away.

So far as I can gather from the accounts, the expenditure of the defendant union for the year 1922 was just under 42,000*l.*, and was made up roughly as follows: about 1860*l.* on depreciation; about 9600*l.* on expenses other than salaries; over 27,000*l.* on salaries, etc., of head office officials, including president, secretaries and other officials, office staff, including income tax on salaries, the National Insurance, and about 3500*l.* in various forms of benefit to members. In other words it cost about 38,500*l.* to distribute 3500*l.* worth of benefit among the members. It is perhaps not surprising, in the light of what I have stated, that litigation has resulted. Upon the facts, as I have found them, it is plain that the statutory conditions precedent to the validity of the amalgamation were not fulfilled, and that prima facie the amalgamation was invalid.

But it is said by way of defence that when once a notice of amalgamation has been registered under s. 13 of the Act of 1876, that registration is conclusive, and the Court cannot inquire whether the conditions precedent to a valid amalgamation prescribed by s. 12 have been complied with or not, and that I ought to read the concluding words of the section as meaning not only what they do say—namely, that until registration amalgamation is not to take effect, but also what they do not say—namely, that after registration of the notice the amalgamation shall take effect, even if the conditions prescribed by s. 12 have not been fulfilled.

A number of decisions on other statutes have been cited to me, but decisions such as these on other statutes dealing with different subject matters and expressed in dissimilar language cannot be of assistance. I am concerned only with the language of the statutes relevant to this case, and that language seems to me to be clear, and its effect in my opinion is as follows: (1.) No statutory power to amalgamate is conferred by s. 12 of the Act of 1876 as amended by the Act of 1917, except subject to the conditions precedent as to ballot mentioned in the section. (2.) Under s. 13 of the Act of 1876 notice in writing of any amalgamation has to be sent to the Registrar and has to be registered, and until registration

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the amalgamation can have no effect. (3.) There is nothing whereby an invalid amalgamation is validated by registration of the notice of it or which renders the registration of such notice conclusive of the validity of the amalgamation. (4.) Sect. 13, sub-s. 5, of the Act of 1871, as to the effect of a certificate of registration of a trade union, has admittedly no bearing upon the question of the effect of the registration of the notice of amalgamation.

The rules of the Stewards' Union contain no provision authorizing amalgamation. The statutory power is the only power which can be relied upon. Upon the facts of this case, as I have found them, the conditions precedent of valid statutory amalgamation were not fulfilled, and in my opinion the amalgamation was a nullity and was not validated by registration of the notice of amalgamation. This conclusion does not, of course, necessarily affect the existence as a union of the defendant union in respect of which a certificate of registration has been issued.

The funds of trade unions are trust funds, and having regard to the invalidity of the amalgamation the defendant union had no title to the funds of the Stewards' Union.

Three further defences are, however, set up. In the first place it is said that the defendant union is a purchaser for value without notice, and cannot be disturbed in the possession of their funds. I am unable to follow the argument. It is true that one of the terms of the proposed amalgamation was that the defendant union should take over the liabilities of the Stewards' Union, but I am unable to appreciate how the defendant union, which was the creation of and governed by the officials of the two original unions responsible for and familiar with the details of the whole transaction, can be said either to be a purchaser or a purchaser without notice, when one of the objects of the creation of the defendant union was to take possession of funds subject to particular trusts known to those responsible for the transaction, and apply them to other purposes.

Secondly, it is contended that the defendant union is immune from attack by reason of s. 4 of the Trade Disputes

Act, 1906, which is as follows: "An action against a trade union, whether of workmen or masters, or against any members or officials thereof on behalf of themselves and all other members of the trade union, in respect of any tortious act alleged to have been committed by or on behalf of the trade union, shall not be entertained by any Court." Then sub-s. 2: "Nothing in this section shall affect the liability of the trustees of a trade union to be sued in the events provided for by the Trades Union Act, 1871, section nine, except in respect of any tortious act committed by or on behalf of the union in contemplation or in furtherance of a trade dispute."

The plaintiff in this case is not seeking to make the defendant union liable for funds of the Stewards' Union actually expended by it. All he asks at the bar in effect is that if he is right as to the invalidity of the amalgamation, the trust funds of the Stewards' Union still in the hands of the defendant union may be ascertained, and the trusts applicable to them carried into execution by the Court. I do not think that s. 4 of the Act of 1906 has any application to an action of this character. It is not an action in respect of any alleged tortious act by the defendant union, but one of a kind well recognized in this Court to establish title to a trust fund which has strayed into wrong hands, and the retention of which by those who hold it would be against conscience. I hold that this action is not within the section in question, and can be maintained. In the third place, it is said that the plaintiff is debarred by reason of his own conduct from maintaining this action, and that if he is personally debarred, he cannot maintain it in a representative capacity on behalf of others. I agree if the plaintiff is personally debarred from remedy, he cannot maintain the action by affecting to sue in a representative capacity. The question is whether he is personally debarred. The plaintiff was in 1921 a local official at Southampton of the Stewards' Union. He was aware that some amalgamation proposals were going forward. He never received a ballot paper or voted. He did not know of any irregularity in connection with the ballot, and, after the registration of the defendant

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union, he became a member and official of that union. Subsequently he quarrelled with the defendant union and ceased to be an official of it, and then, having ascertained for the first time the facts as to the ballot of the Stewards' Union in connection with the amalgamation, he commenced this action.

The question is whether, on the principles recognized here, the plaintiff has by his conduct deprived himself of the remedy which he would otherwise have in a case of this kind. In order to deprive him of his remedy, it must, I think, be shown that he has so acted with full knowledge of all material facts as to approve what has been done and abandon any rights which he would otherwise have. There is, in fact, alleged against the plaintiff here nothing except that he became a member of and served the defendant union, but he did that, as I find, without knowledge of the true facts, and I am unable to hold that such conduct precludes him, on discovering the true facts, from seeking to insist upon the enforcement of the trusts properly applicable to funds which are traced into the defendant union's hands.

The action therefore succeeds.

I shall declare that no valid amalgamation was ever effected between the Stewards' Union and the British Seafarers' Union, and that notwithstanding the attempted amalgamation the funds and property of the Stewards' Union remained subject to the trusts applicable thereto as funds and property of such union. I shall grant an injunction to restrain the defendant union, their officers, trustees, servants and agents from parting or otherwise dealing with any funds or property derived from or representing any part of the funds or property of the Stewards' Union. There will also be an inquiry what are the funds or property now held by the defendant union or by any person or persons or body to the order or for the use of the defendant union derived from or representing any part of the funds or property of the Stewards' Union, and I shall direct a further inquiry who are the persons being members of the Stewards' Union, or persons deriving title from any of such members now entitled to the funds and

property of the Stewards' Union and in what shares and proportions, but this second inquiry is not to be proceeded with without the leave of the judge in person, and the further consideration of this action will be adjourned with liberty to apply.

The defendant union must pay the costs of the action up to and including the judgment.

Solicitors: *Vizard, Oldham, Crowder & Cash; W. H. Thompson.*

H. C. G.

In re TAYLOR

WATERS *v.* TAYLOR.

[1926. T. 250.]

Will—Settlement—Shares in Companies—Tenant for Life and Remainderman—Distribution by Company of new Bonus Shares—Option to Shareholders—Capital or Income—Payment of Dividends to Tenant for Life—Company's Intention on Distribution—Capitalization—Trustees treating distributed Shares as Capital—Principles followed.

Where, on a distribution of bonus shares by a company to the shareholders, there is a doubt whether such shares are to be considered as capital or income, as between the tenant for life and remainderman under a will, the principle to be followed is that it is the intention of the company that is to be regarded. If the company intend to capitalize, it is capital; if there is no such intention, it is not capital.

Therefore in determining such a question reference must be had to substance and not merely to form, and where it is found that the transaction is in form one in which an option is given to the shareholder, that is not necessarily a factor which determines that it is income and not capital.

The option would be immaterial if, from the other documents and facts, it appeared reasonably clear that the company, notwithstanding the form, intended to capitalize.

The principles of *Bouch* v. *Sproule* (1887) 12 App. Cas. 385 and *In re Evans* [1913] 1 Ch. 23 followed.

ADJOURNED SUMMONS.

By his will dated May 15, 1903, the testator, Thomas Alexander Taylor, after appointing his wife, A. M. M. Taylor,

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and two other persons therein named executors and trustees thereof, and after various bequests, gave and devised the residue of his freehold property to his wife for life with remainder in trust for his issue as therein mentioned. And in case there should be no son who should acquire a vested interest in such freehold estates, then he directed his trustees to sell the same and hold the net proceeds thereof upon the trusts of his residuary estate thereinafter mentioned. The testator then gave such residuary estate, both real and personal, on the usual trusts for sale, conversion and investment, and directed his trustees to stand possessed of the residuary trust moneys and the investments thereof (thereinafter called the residuary trust funds) in trust to pay the income thereof to his wife for her life, and after her decease in trust for all his children as therein mentioned; and if no child or grandchild should live to attain a vested interest, the testator directed his trustees to stand possessed of the residuary trust funds and the investments thereof in trust after payment thereout of a sum of 500*l.* for his two sisters as tenants in common in equal shares as therein mentioned.

The testator died on June 28, 1904, without ever having had any children by his marriage.

The widow married a Mr. A. J. Coke on November 12, 1907. In 1914 new trustees of the will of the testator were appointed. Mr. A. J. Coke died in 1921, and his widow died on April 25, 1925, having by her will dated April 21, 1925, appointed the plaintiff her sole executor and residuary legatee.

The residuary estate of the testator, Thomas Alexander Taylor, included amongst other investments fifty ordinary shares of 10*l.* each in a company called the Dooars Tea Co., Ld. In 1911, the company having decided to increase their capital, in pursuance of a special resolution to that effect, allotted to the trustees of the will of the testator 200 bonus ordinary shares of 1*l.* each in the company at par. These 200 ordinary shares represented the amount to which the testator's estate was entitled to on the distribution by the company, and were of considerable value.

The income on the shares was throughout the lifetime of the tenant for life, Mrs. A. M. M. Coke, paid to her direct, and such shares were always in fact treated as part of the capital of the testator's estate. The circumstances under which the shares were allotted by the company are fully set out in the judgment.

Questions having arisen as to whether the 200 bonus ordinary shares should be treated as part of the capital of the testator, a summons was taken out by the plaintiff, Martin Waters, as the legal personal representative of the tenant for life, Mrs. A. M. M. Coke, for (inter alia) the determination of the question whether the 200 ordinary shares of 1*l.* each in the capital of the Dooars Tea Co., Ld., allotted to the trustees of the will of the testator T. A. Taylor at par and paid for out of moneys distributed by such company by way of dividend formed part of the estate of Mrs. A. M. M. Coke or formed part of the capital of the testator, T. A. Taylor, and if the latter, whether the estate of the said A. M. M. Coke was entitled to so much of the value of the shares as represented the dividend applied in taking them up.

Galbraith K.C. and *Vanneck* for the applicant. The estate of the tenant for life is entitled to share in the distribution by the company, notwithstanding the length of time that has elapsed. Although cases such as *Bouch* v. *Sproule* (1) and *In re Evans* (2) are against our contention, still the facts of each particular case have to be considered, and are distinguishable from the facts in the present case.

[TOMLIN J. The principle of *Bouch* v. *Sproule* (1) is that in these kind of cases the company determines if the shares are to be income or capital; therefore it is always a question of fact if the company has determined or not.]

That is so, but here the tenant for life is entitled to a share. There have been numerous cases on this point, and the principles of *In re Malam* (3) and *In re Northage* (4) should be followed and are relied on. Other cases in favour of our

(1) 12 App. Cas. 385.
(2) [1913] 1 Ch. 23.
(3) [1894] 3 Ch. 578, 581, 585.
(4) (1891) 60 L. J. (Ch.) 488.

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contention are *In re Tindal* (1); *In re Despard* (2); *In re Hume-Nisbet's Settlement.* (3) One should also look at *In re Piercy.* (4) On the question as to these shares being treated by the trustees as capital, this should not be taken into account. See Gover on Capital and Income, 2nd ed., at p. 14, "Mistake."

W. M. Hunt for the remainderman. The principles of this class of case are no longer in doubt. *Bouch* v. *Sproule* (5) and *In re Evans* (6) completely cover this point and cannot now be controverted.

Guest Mathews for two other defendants.

Galbraith K.C. in reply. He referred to *In re Hatton.* (7)

TOMLIN J. In this case I have to determine a question of right between tenant for life and remainderman under the will of a testator who died on June 28, 1904. Under that will, the widow of the testator was tenant for life of his residuary estate with a reversion to certain of his brothers and sisters. The widow remarried in 1907; but that did not affect her life interest under the will, and eventually she died on April 25, 1925. After her death her legal personal representative, who is the plaintiff and also the residuary legatee under her will, raised a claim as to whether certain shares which in 1911 had been allotted to the trustees of the will, were to be treated as representing a dividend which belonged to the tenant for life, or whether they were properly treated as capital. The shares in fact were throughout the lifetime of the tenant for life, that is to say, from 1911 to 1925, apparently treated as capital, the income only being paid to her, and there is no evidence that at any time during her lifetime she made any claim to be entitled to anything more than that which she received—namely, the income on the shares.

The circumstances in which the shares were allotted are these. The testator was the holder of shares in a company

(1) (1892) 9 Times L. R. 24.
(2) (1901) 17 Times L. R. 478.
(3) (1911) 27 Times L. R. 461.
(4) [1907] 1 Ch. 289.
(5) 12 App. Cas. 385.
(6) [1913] 1 Ch. 23, 33.
(7) [1917] 1 Ch. 357.

called Dooars Tea Co., Ld. That was a company which had been incorporated in the year 1885 with a capital of 150,000*l.* in 15,000 shares of 10*l.* each, but at some time before the year 1910, its capital had been increased to 295,000*l.*, represented by 170,000 1*l.* ordinary shares and 12,500 7 per cent. cumulative preference shares of 10*l.* each. Of those shares, only 150,000 ordinary shares and 7500 of the preference shares had in fact been issued and were fully paid, so that its total issued capital was 225,000*l.* The holding of shares in the company by the testator's estate was, I understand, 500. In May, 1911, the directors of the company issued their report in relation to the year ending December 31, 1910. That report is dated May 30, 1911. At the same time, there was sent out a notice of an ordinary general meeting to be held on Thursday, June 8, 1911, and among the business for transaction was the passing of certain special resolutions which are set out in the notice. The first resolution is in these terms: "That out of the undivided profits of the company standing to the credit of the company's revenue reserve account, there be distributed amongst the holders of the ordinary shares of the company, in accordance with their rights and interests in the profits of the company, the sum of 60,000*l.*; and that the directors be authorized with the consent of the holders of the ordinary shares of the company respectively entitled thereto, to apply the same or any part thereof in the payment of ordinary shares of the company at par, with power in the case of fractions of shares to make such provision for the issue of fractional certificates as they may think expedient." The second resolution was: "That the capital of the company be increased to 335,000*l.* by the creation of 40,000 new ordinary shares of 1*l.* each." Now it will be observed that the nominal amount of the increased capital of 40,000*l.*, together with the nominal amount of the unissued ordinary shares of the company, namely, 20,000*l.*, is the exact figure, namely, 60,000*l.*, proposed to be distributed as bonus. The report which accompanied that notice contained (on p. 8) a statement of what the directors proposed to do in respect of dividends. From that

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statement it appears that the directors recommended a dividend of 15 per cent. on the ordinary shares, and a bonus of 15 per cent., making a total distribution of 30 per cent. In regard to that, there was no question that that was a 30 per cent. dividend and bonus declared and paid in cash, and received by the tenant for life. But the report goes on: "With the addition of 5000*l.* recommended in the present report, the total reserves will amount to 115,000*l.*, and the directors propose that 60,000*l.* of this sum shall be applied in paying up in full 60,000 ordinary shares of 1*l.* each, to rank in every respect as from January 1, 1911 (but excluding the balance dividend to be proposed at the forthcoming meeting), with the ordinary shares of the company already issued, such shares to be distributed to the ordinary shareholders as a bonus"—that, of course, is an additional bonus to the cash bonus referred to above—"at the rate of two fully paid shares for every five shares appearing on the register on May 31, 1911, which is the date the transfer books will be closed. For this purpose the capital will be increased by the resolution set out in the notice convening the meeting." Up to that point it is plain that what the directors had in mind was to capitalize 60,000*l.*, and to capitalize it by the distribution of 60,000 ordinary shares of 1*l.* each made up of 20,000 unissued ordinary shares, and 40,000 new ordinary shares to be created by the second resolution. Then they proceed as follows: "The directors have however been advised by the company's solicitors, that in order to comply with the legal requirements, every shareholder must be given the option of either having bonus shares allotted to him or being paid a sum equivalent to the par value of such shares, but it is obvious, inasmuch as the ordinary shares stand at a high premium, it is to the advantage of the shareholders to accept bonus shares instead of the par value thereof in cash." I think it appears from some of the documents that the 1*l.* shares in fact stood at something between 3*l.* and 4*l.*, so that it is difficult to conceive any shareholder exercising the option in favour of taking cash, rather than of taking shares which on sale would produce

to him something like 3*l.* or 4*l.* each. It appears from the accounts which are annexed to that report that, having regard to the cash dividend and bonus declared in respect of the ordinary shares, there were not available assets which could be immediately applied in at once paying the dividend and bonus on the ordinary shares and the 60,000*l.*, and I think it may be said to be reasonably plain that the intention of the directors of the company, as indicated by their report, examined in the light of the company's position, was that there should not leave the coffers of the company a single penny of the 60,000*l.* When we examine the method in which they carried out their scheme that becomes still more evident. I should say that on June 8 the meeting was duly held, and the special resolution passed, and on June 17 the secretary sent out to each shareholder a letter in which, after setting out the resolution as passed on June 8 (and that was in the terms which I have read out from the notice), he proceeds as follows: "In accordance with this resolution, as the registered holder of ( ) ordinary shares"—it is a printed form, and that would be the number of shares of which at the given date in May, 1911, he was the registered holder—"you are entitled to an allotment of ( ) fully paid new shares free of all charge"—that is the number of shares which represent his proportion of the 60,000*l.*—"and unless I hear from you to the contrary, a certificate will be made out and issued in your favour for ( ) shares. In order to meet the cases of shareholders who may have recently sold all or part of their holdings-cum-bonus, letters of renunciation for the new shares will be issued on application to this office being made not later than July 8." Then on July 22 a further circular letter is sent out to the shareholders, which is headed: "Bonus ordinary shares. I beg to hand you herewith certificate for ( ) shares"—that is the number of shares that the shareholder was entitled to in respect of the 60,000*l.*—"and shall be glad if you will sign and return the receipt at the foot hereof." Then the receipt is headed: "Bonus ordinary shares. Received of the above mentioned company," and so on. There is not a document, so far as I have been

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instructed in the facts, by which any sort of opportunity is given to any shareholder to exercise an option. The moment the resolution is passed apparently, the shares, which represent the 60,000*l.*, are allotted to the several shareholders. Their sanity in every case is assumed by the company. It is said that, notwithstanding that state of affairs, I am in a position to-day to say that there was no capitalization of that bonus distribution, and that after fifteen years, the legal personal representative of the tenant for life is entitled to come and say: "That was a mistake; the tenant for life ought to have had her share of the 60,000*l.*, and I to-day am entitled to recover it."

The principles upon which these cases have to be determined are not in doubt. The only doubt that ever arises is in the application of the principles to the facts of each particular case. The principle as laid down by the House of Lords and as accepted, as it was bound to be accepted, by the learned judges who have had similar cases before them since the decision in the House of Lords, is that you test the question of income or capital by the intention of the company. If the company intended to capitalize, it is capital; if the company did not intend to capitalize, it is not capital; but in determining whether or not a company intends to capitalize, reference must be had to substance and not merely to form, and where in fact you find that the transaction is in form one in which an option is given to the shareholder, that is not necessarily a factor which determines that it is income and not capital. On the contrary that is immaterial if, from the other documents and facts, it reasonably and clearly appears that the company, notwithstanding the form, intended to capitalize.

The position is very clearly stated by Neville J. in *In re Evans*. (1) He points out how a difficulty had been felt by companies in that they could not discriminate between one shareholder and another, and, therefore, they could not say to a shareholder: "If you will not put your money into the shares, you shall not have anything at all"; they

(1) [1913] 1 Ch. 23.

were bound to treat them all alike, and their only way of securing the capitalization, apart from some special provision in their constitution enabling them to do so, was to give the shareholder not only an option, but to give the shareholder an option, subject to such conditions that it was incredible that he would exercise it otherwise than in the direction which the company intended—namely, by subscribing for the shares. That generally is the explanation of the form in all those earlier cases. Now, that being so, I am wholly unable to distinguish this case upon its facts from the cases that have been cited in argument, and, as Neville J. has pointed out, the question first to be determined is a question of fact. I am wholly unable to distinguish it upon its facts from *Bouch* v. *Sproule* (1) and *In re Evans* (2), and I hold as a fact that it was the intention of the company to capitalize this 60,000*l*. The various cases which have been cited to me by Mr. Galbraith seem to me to be all explainable and distinguishable upon the ground that in the particular circumstances of each of those cases, the learned judge who determined it, held that in fact it was not the intention of the company to capitalize, arriving at that conclusion for divers reasons, sometimes because he held on the facts that the transaction of the issue of the shares and the transaction of the declaration of the dividend were wholly distinct, and sometimes for other reasons; but in each one of those cases there is absent those elements which seem to me to be present here and which clearly establish to my mind what the intention of the company was.

I must therefore declare that this claim by the representative of the tenant for life fails, and that the shares in question form part of the corpus of the residuary estate.

Solicitors for the plaintiff: *Wingfields.*

Solicitors for the defendants: *Taylor, Jelf & Co., for Wilson & Sons, Salisbury.*

(1) 12 App. Cas. 385. (2) [1913] 1 Ch. 23.

A. R. T.

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May 17, 18; *June* 8.

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[1925. D. 2734.]

Vendor and Purchaser—Specific Performance—Agent purchasing as Principal—Enforceability of Contract by Principal — Misrepresentation — Non-disclosure of Principal — Personal Qualifications of Purchaser—Purchaser an undischarged Bankrupt — Worthlessness of insolvent Purchaser's Covenants—Trivial Breach by Plaintiff of Term of Contract —Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 47.

Unless the possession by one of the contracting parties of some personal quality is a material ingredient of the contract, the mere non-disclosure of the person actually entitled to the benefit of the contract for the sale of land is no defence to an action for specific performance, even although the plaintiff knows that, if the disclosure had been made, the defendant would not have entered into it.

D. knowing that the defendants would refuse to treat with him, procured C. to enter into a contract with them for the sale to him of two plots of land without disclosing that he (C.) was purchasing on behalf of D. The plots were sold subject to stipulations that the purchaser should erect and maintain certain fences, and also submit plans of any building to be erected on the plots to the vendors' architect for his approval. Long before the date fixed for completion, C., without the knowledge or consent of the defendants, entered into possession of and began to build upon each of the plots. As the result of subsequent complaints by the defendants that C. had committed a breach of the stipulation to submit plans before building, the defendants at the request of C., but (as the Court held to be the fact) without the authority of D., purported to cancel the contract, in consequence whereof D. brought this action for specific performance of the contract. Three grounds of defence were put forward—namely, (1.) that the plaintiff deceived the defendants as to the real person with whom they were contracting; (2.) that the plaintiff was at the date of the contract an undischarged bankrupt; and (3.) that the plaintiff had himself committed a breach of the contract to submit plans:—

Held, first, that applying the principle above stated, the first ground of defence failed; secondly, that (*a*) in the absence of any intervention by the trustee in the plaintiff's bankruptcy, the plaintiff was entitled to bring his action for specific performance of the contract made after adjudication; (*b*) the contract was a protected transaction within s. 47 of the Bankruptcy Act, 1914; (*c*) the contract having been entered into after adjudication, the plaintiff was capable of so paying his purchase money to the defendants, as the latter would be certain of being able to retain it against the trustee: *Franklin* v. *Lord Brownlow* (1808) 14 Ves. 550 distinguished; and (*d*) in view of the circumstance that the defendants having parted with the remainder of the estate of which the plots formed part, would suffer no pecuniary damage if the plaintiff

owing to bankruptcy were unable to perform the stipulations in the contract, his bankruptcy was no bar to his obtaining specific performance of the contract: *O'Herlihy* v. *Hedges* (1803) 1 Sch. & Lef. 123 distinguished; and thirdly, that the failure on the part of the plaintiff himself to submit building plans was, in the circumstances, of too trivial a nature to disentitle him to specific performance.

WITNESS ACTION.

This was an action for the specific performance of an agreement which was entered into in the circumstances stated in the judgment of the Court as follows:—

The defendants, W. E. R. Randall & Sons, are auctioneers and estate agents carrying on business at Chatham in Kent. The other defendants (who were added as parties to the action at the trial) are the owners in fee of two plots of land numbered 43c and 43d on the plan of a building estate at Chatham known as the "Maidstone Road Estate." The plaintiff was in the employment of the first named defendants (hereinafter called "the defendants") as draughtsman from 1920 to 1923. After that date he became one of the directors and the manager and secretary of a small company promoted by his employers and himself. In January, 1924, he was discharged from his office of manager and secretary of the company under circumstances which to his knowledge caused the defendants profoundly to distrust him and to render it certain that they would not enter into any further business transaction with him. In February, 1924, the plaintiff became bankrupt and has not yet obtained his discharge.

During the whole of the time the plaintiff was in the employment of the defendants, they had been engaged on behalf of the owners in developing the "Maidstone Road Estate" as a residential building estate, according to a building scheme which had been prepared for that purpose. Before the month of May, 1925, the whole of the Maidstone Road Estate had been sold with the exception of the two plots numbered 43c and 43d on the estate plan.

In May, 1925, the plaintiff desired to acquire these two remaining plots with the intention of erecting thereon a couple of bungalows and then disposing of them at a profit. Knowing that the defendants would not entertain any offer

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he might make for the plots, if he were to approach them directly, the plaintiff procured a friend of his named Crossley to buy the plots for him, without disclosing the fact that he was acting as his agent.

Accordingly, Crossley on May 7, 1925, entered into an agreement in writing with the defendants to purchase the two plots for the sum of 100*l.*; August 7 being fixed as the date for the completion of the purchase, and no provision being inserted which enabled the purchaser to take possession before that date. The sale was expressed to be made subject to certain stipulations which since the year 1921 had been made generally applicable to the estate. For the purposes of this case it is unnecessary to refer to more than the following three of those stipulations, namely:—

"1. The purchaser shall forthwith make and afterwards maintain the boundary fences next the road and on the sides of the property marked T within the boundary. No fence of a greater height than 4 feet shall be erected in front of the building line."

"4. The purchaser shall until the roads, footpaths, sewers and works connected therewith abutting upon the property have been adopted by the local Authority contribute his fair proportion towards maintaining and repairing the same and shall be responsible for any damage to the said roads, footpaths, etc., occasioned by him or by contractors or servants working under his authority."

"8. Plans of all houses and buildings to be erected on the estate shall be approved by the vendors' architect, W. E. R. Randall, junior, who shall be paid a nominal fee of one guinea for perusal."

On signing the agreement Crossley paid to the defendants a deposit of 10*l.* with which he had been provided by the plaintiff. On May 9, 1925, the plaintiff without the knowledge or consent of the defendants took possession of the two plots. On May 14, the plaintiff verbally agreed to sell plot 43c to Mrs. Kelly, and on the same date he entered into a written contract with her to build a bungalow on this plot to be completed and delivered to her on or before August 4, 1925,

for the sum of 600*l.*, to be paid, as to 50*l.* on entering into the contract and the balance up to 90 per cent. of the contract price from time to time as the work proceeded; the ultimate balance of 10 per cent. being payable as to one-half on the completion of the bungalow and the remaining half one month after the completion. The contract contained a stipulation that in default of completion on or before August 4, 1925, the plaintiff should forfeit as liquidated damages the sum of 1*l.* per week for each week that the bungalow remained unfinished.

Shortly after entering into this contract, the plaintiff without the knowledge or consent of the defendants and without having submitted any plans to their architect commenced the erection of Mrs. Kelly's bungalow on plot 43c. The building of the bungalow proceeded apace, and Mrs. Kelly in pursuance of her contract paid to the plaintiff from time to time in respect thereof sums amounting in all to 450*l.* The plaintiff also constructed the foundations of another bungalow and executed certain other works on plot 43d, spending about 60*l.* in so doing. On July 21, 1925 (at which date Mrs. Kelly's bungalow had been partially roofed in), the defendants for the first time discovered that building operations were proceeding upon the two plots, and on the same day wrote to Crossley calling his attention to the fact that no plans for any building on these plots had been submitted for the approval of the vendors' architect.

—His Lordship then proceeded to deal with the history of the case subsequent to that letter of July 21, 1925, in some detail, but it is sufficient for the purpose of this report to state that Crossley, then finding himself in a difficult situation, disclosed his true position to the defendants and sought to be relieved from his contract, to which the defendants assented, and accordingly the defendants and Crossley purported to cancel the contract; but it was so cancelled (as the Court held upon the facts proved before it at the trial) without the authority of the plaintiff. It was in consequence of that cancellation of the contract by the defendants that the plaintiff brought this action for its specific performance and for damages.

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Lort-Williams K.C. and *Thomas Dawson* for the plaintiff. Assuming the contract was not validly cancelled, in a case like the present where the personality of the other contracting party was not a material element, and where there was no misrepresentation, the mere fact that the purchasers thought that they were contracting with Crossley does not absolve them from their obligations under the contract. Here Crossley bought the plots ostensibly on his own account, but really as agent for the plaintiff, and there is no evidence to show that, provided the defendants obtained the price, they would not have been equally willing to sell to any other person than Crossley; the defendants therefore cannot resist the claim for specific performance: Williams on Vendor and Purchaser, 3rd ed., vol. ii., p. 750; *Nash* v. *Dix.* (1) The plaintiff made no false representation as in *Archer* v. *Stone* (2), where an order for specific performance was on that ground refused.

Owen Thompson K.C. and *J. E. Harman* for the defendants. First, there was no contract with the plaintiff. The defendants contracted with Crossley, upon whose solvency they relied, and they contracted with him as principal. Crossley was not entitled to assign the benefit of the contract to an undischarged bankrupt and call upon the vendor to convey to him: Fry on Specific Performance, 6th ed., p. 100, pl. 225. Secondly, notwithstanding the protection afforded by s. 47 of the Bankruptcy Act, 1914, the trustee in the bankruptcy of the plaintiff might have intervened and, having regard to the onerous stipulations contained in the contract, he might have disclaimed the contract under s. 54 of that Act.

[LAWRENCE J. If Crossley had assigned the contract to an undischarged bankrupt who was ready to pay his purchase money, how could the vendor object?]

That may be true in the case of a sale of a chattel, but it does not apply to the sale of real estate, where the time for completion has not arrived. The plaintiff, who may never pay the purchase money, cannot be allowed to hide himself

(1) (1898) 78 L. T. 445. (2) (1898) 78 L. T. 34.

behind his agent Crossley. Further, the plaintiff cannot enforce the contract because, being an undischarged bankrupt, the defendants were incapable of so paying the purchase money to the vendor as that he would be certain of being able to retain it against the trustee in his bankruptcy: Fry on Specific Performance, 6th ed., pl. 950, p. 446; *Franklin* v. *Lord Brownlow*. (1) Further, the contract contains stipulations which may involve the purchaser in a substantial expenditure of money, and which owing to his insolvency the plaintiff may never be able to pay. The principle of *O'Herlihy* v. *Hedges* (2) applies. A third ground upon which the defendants resist specific performance is that the plaintiff himself having committed a substantial breach of the stipulation to submit plans to the defendants' architect precluded himself from insisting upon specific performance.

Lort-Williams K.C. in reply. The defence that the plaintiff was an undischarged bankrupt is unsound. The contract was entered into after the bankruptcy, and is a transaction protected by s. 47 of the Bankruptcy Act, 1914, which is a statutory recognition of the proposition laid down in *Cohen* v. *Mitchell* (3)—namely, that "until the trustee intervenes, all transactions by a bankrupt after his bankruptcy with any person dealing with him bona fide and for value, in respect of his after acquired property, whether with or without knowledge of the bankruptcy, are valid against the trustee." The trustee here not having intervened, the plaintiff is entitled to deal with the contract as after acquired property of the bankrupt until he does: *Hill* v. *Settle*. (4) Crossley, the only person with whom the defendants contracted, was under no disability; the fact that Crossley's principal was under disability is immaterial. In *Franklin* v. *Lord Brownlow* (1) the facts were different: the purchaser there, after having entered into the contract, committed an available act of bankruptcy and did not (as the plaintiff did here) enter into the contract after the bankruptcy.

Cur. adv. vult.

(1) 14 Ves. 550.
(2) 1 Sch. & Lef. 123.
(3) (1890) 25 Q. B. D. 262, 267.
(4) [1917] 1 Ch. 319, 326.

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June 8. LAWRENCE J. [after stating the facts as above set out and after deciding that Crossley had no authority from the plaintiff to agree to the cancellation of the contract and that there was no subsequent ratification by the plaintiff of such purported cancellation proceeded as follows :] I now come to the main question in the case—namely, whether in the circumstances the plaintiff is entitled to specific performance of the agreement. It is clearly established that as between the plaintiff and Crossley the latter throughout acted as the agent of the former and that there never was any intention that Crossley should buy the property for himself. The defendants contended that the plaintiff is not entitled to specific performance on three grounds—namely, first, because the plaintiff deceived the defendants in regard to the person with whom they were contracting and therefore there was no contract ; secondly, because the plaintiff is an undischarged bankrupt ; and thirdly, because the plaintiff has committed a breach of the agreement by not submitting plans for the approval of the defendants' architect before commencing the erection of the bungalow.

In considering the first ground, it is essential to bear in mind that the agreement which the plaintiff seeks to enforce is not one in which any personal qualifications possessed by Crossley formed a material ingredient, but is a simple agreement for sale of land in consideration of a lump sum to be paid on completion. It is an agreement which the defendants would have entered into with any other person. It is well settled that the benefit of such an agreement is assignable and that the assignee can enforce specific performance of it. If Crossley had entered into the agreement on his own behalf (as the defendants believed he had) he could immediately have assigned it to the plaintiff and the defendants would have been bound to convey the plots to the plaintiff. Moreover, as Crossley had not, before signing the agreement, disclosed the fact that he was acting as agent, he was liable under it as principal and the defendants could have compelled him to complete the purchase.

Further, it is to be noted that in this case there was no direct misrepresentation such as there was in *Archer* v. *Stone*. (1) Crossley was not asked by the defendants whether he was buying for the plaintiff and he made no statement to the defendants on the subject. The real question therefore is whether Crossley's silence, in the circumstances, amounted to a misrepresentation which renders the agreement unenforceable in this Court. In my judgment mere non-disclosure as to the person actually entitled to the benefit of a contract for the sale of real estate does not amount to misrepresentation, even though the contracting party knows that, if the disclosure were made, the other party would not enter into the contract ; *secus*, if the contract were one in which some personal consideration formed a material ingredient : see *Nash* v. *Dix* (2) and *Said* v. *Butt*. (3) In *Nash* v. *Dix* (2) North J. held that the ostensible purchaser was acting on his own account and not as agent, but it appears to me that the learned judge would have arrived at the same conclusion if the alleged agency had been established. In *Said* v. *Butt* (3) McCardie J. relied entirely on the personal consideration which entered into the contract and would obviously have decided otherwise if the personal element had been absent. I therefore hold that the first ground relied upon by the defendants does not afford a good defence to the plaintiff's claim to specific performance.

The next point to be considered is whether the fact that the plaintiff is an undischarged bankrupt debars him from obtaining specific performance. The plaintiff will not of course get a conveyance until he pays the balance of the purchase money. The trustee in the plaintiff's bankruptcy, although stated by Mr. Lort-Williams to be aware of the plaintiff's interest in the agreement, has not intervened in any way. It is well established that after acquired property continues in the bankrupt until the trustee interferes to claim it, and that, subject to the right of the trustee to intervene, an undischarged bankrupt can maintain any action in relation

(1) 78 L. T. 34. (2) 78 L. T. 445.
(3) [1920] 3 K. B. 497, 501.

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to after acquired property and can sue on any contract made with him after bankruptcy. Further, under s. 47 of the Bankruptcy Act, 1914, all transactions by a bankrupt with any person dealing with him bona fide and for value in respect of property, whether real or personal, acquired by the bankrupt after the adjudication, if completed before any intervention by the trustee, are valid against the trustee. This section applies whether the parties dealing with the bankrupt were so dealing with or without knowledge of the bankruptcy: *Cohen* v. *Mitchell*. (1) In the present case it is clear that in entering into the agreement with Crossley the defendants were dealing bona fide and for value and are therefore protected against the claim by the trustee, so long as he does not intervene before completion. It was suggested that the right conferred by s. 54 upon the trustee to disclaim onerous property operated to prevent the plaintiff from obtaining specific performance. I find some difficulty in appreciating this suggestion, as the trustee has not intervened to claim the benefit of the agreement, and I cannot conceive that he would intervene merely in order to disclaim. Assuming, however, that he were to do anything so foolish after the completion of the sale, the only result would be that the defendants would have the purchase money in their pockets and would probably obtain a vesting order of, at all events, so much of the land as the plaintiff had not contracted to sell to Mrs. Kelly; thus being placed in the happy position of having received the price of both plots and of obtaining one plot back again. Mrs. Kelly having bona fide bought plot 43c and having expended 450*l.* towards building a bungalow upon it, would, in the event of disclaimer, no doubt be protected by the Court both under s. 47 and under s. 54. Mrs. Kelly as a sub-purchaser from the plaintiff should, in my opinion, have been joined as co-plaintiff, but the defendants have raised no objection on the ground of want of parties. She has been called as a witness on behalf of the plaintiff and has supported his claim, being of course vitally interested in the success of this action. Mr. Owen

(1) 25 Q. B. D. 262.

Thompson relied upon the statement in Fry on Specific Performance, 6th ed., p. 446, pl. 950, that a bankrupt purchaser cannot enforce the contract, because he is incapable of so paying the purchase money to the vendor as that the vendor shall be certain of being able to retain it against the trustee. The case cited in support of this statement is *Franklin* v. *Lord Brownlow* (1), which, however, is distinguishable from the present case in that there the purchaser was not a bankrupt acquiring property after his adjudication, but was a person who after entering into a contract to purchase committed an available act of bankruptcy of which the vendors had notice, with the consequence that, owing to the relation back of the trustee's title, the vendors, if they had completed the sale and if bankruptcy had supervened, would have had to pay back the purchase money to the trustee. Moreover, at the date when that case was decided there was no enactment such as is contained in s. 47 of the Bankruptcy Act, 1914. With some diffidence I venture to suggest to the authors of that valuable work that the more accurate way of stating the result of that case is, that a purchaser who has committed an available act of bankruptcy of which the vendor has notice cannot enforce the contract, because he is incapable of so paying the purchase money to the vendor as that the latter shall be certain of being able to retain it against the trustee, should bankruptcy supervene. In the present case it is clear that the plaintiff is capable of so paying the purchase money to the vendors as that the latter will be certain of being able to retain it against the trustee.

It was further contended that the plaintiff could not enforce specific performance, because the agreement involved his entering into covenants with the vendors, which owing to his bankruptcy would be rendered worthless. In support of this contention the case of *O'Herlihy* v. *Hedges* (2) was relied upon. In that case specific performance of a lease of a farm was refused on the ground (inter alia) that the solvency of the tenant formed a material ingredient in entering into the

(1) 14 Ves. 550. (2) 1 Sch. & Lef. 123.

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agreement. In my opinion neither the decision in that case nor the principle upon which it was decided govern the present case. Where a lease is concerned (especially an agricultural lease) the solvency of the tenant must necessarily be of the first importance. Here, in so far as the stipulations are merely restrictive of the user of the land, they could be enforced by injunction, notwithstanding the bankruptcy of the plaintiff, and in so far as the stipulations involve the expenditure of money (namely, the stipulations as to the fencing of the plots and contributing towards the expense of the maintenance and repair of the roads), it is important to note that the vendors have parted with the whole of the rest of the estate, and that after the completion of the plaintiff's purchase they will no longer be interested in any part of it. The defendants therefore can suffer no pecuniary damage, even if the plaintiff should hereafter be unable to perform these covenants. In so far as the other owners who have purchased with similar covenants are concerned, they are powerless to prevent the defendants from selling the two remaining plots to an impecunious person. If such owners could establish that the defendants were trustees of the plaintiff's covenants for their benefit, they might no doubt compel the defendants to sue the plaintiff for any breach, but in such a case they would have to indemnify the defendants and the defendants would suffer no loss if such an action should prove abortive. In the special circumstances, the mere fact that the agreement involves the entering by the plaintiff into covenants in the terms of the stipulations annexed to the agreement does not, in my opinion, debar him from obtaining specific performance. On the whole therefore I have come to the conclusion that the bankruptcy of the plaintiff does not afford a good defence to the action.

As regards the third ground relied upon by the defendants; whilst it is clearly settled that a plaintiff who has committed a breach of an essential term of the agreement cannot obtain specific performance, yet this principle does not, in my opinion, extend to non-essential or trivial breaches. Here, the only breach complained of consists in not submitting the

plans of Mrs. Kelly's bungalow to the vendors' architect for approval before commencing the erection of such bungalow. Mr. Randall in the witness box, when shown the plans of the bungalow, admitted that they were unexceptionable and would no doubt have been passed by the vendors' architect. In these circumstances, the breach in my judgment is a trivial one and not such as to disentitle the plaintiff to specific performance.

In the result, for the reasons stated, I have come to the conclusion that the plaintiff is entitled to a decree for specific performance of the agreement of May 7, 1925.

[His Lordship considered the plaintiff's claim for 100*l.* damages in addition to specific performance which he claimed in respect of the deterioration which he alleged that the bungalow had suffered owing to the plaintiff having abstained from completing it pending the determination of the question whether he was entitled to specific performance of the contract; and held that, having taken possession of the land and erected a bungalow upon it before completion of the purchase, the plaintiff was not entitled to damages for the deterioration of a building which he ought not to have erected on the land. As regards the costs, his Lordship decided in the exercise of his discretion to make no order as to the costs of the action.

In the result a decree was made for specific performance without damages or costs.]

Solicitors: *Lawson & Lawson; Frederic John Berryman, for Wallace Watson & Flint, Chatham.*

H. C. H.

ASTBURY J.

1926

April 23, 27.

In re CRADOCK'S SETTLED ESTATES.

[1926. C. 461.]

Settled Land—Tenant for Life—Settlement constituted by Will—Disentailing Deed—Resettlement—Restoration of Tenant for Life's Estate under Will—Remainderman—Marriage Settlement—Compound Settlement—Powers of Tenant for Life—Settled Land Act Trustees—Vesting Deed—Settled Land Act, 1925 (15 *Geo.* 5, *c.* 18), *s.* 1, *sub-s.* 1; *s.* 22, *sub-s.* 2; *s.* 31, *sub-s.* 1; *Second Schedule, para.* 1, *sub-paras.* 1, 2 *and* 3.

A tenant for life to whom under a resettlement a life estate is limited in restoration of his life estate under a preceding will, is for the purposes of the Settled Land Act, 1925, a tenant for life under the original will; and as such can by virtue of s. 22, sub-s. 2, of the Act exercise not only the powers conferred upon him as tenant for life under the will but also any additional powers conferred on a tenant for life by the resettlement.

Where therefore under the original will constituting a settlement, a subsequent disentailing deed, a resettlement, another disentailing deed (whereby the tenant in tail in remainder became tenant in fee simple in remainder), and a conveyance of the remainder to trustees upon trust to sell and hold the proceeds upon the trusts of a deed of even date (being a settlement executed on the marriage of the remainderman), lands stand limited in trust for persons by way of succession, all the aforesaid instruments constitute a compound settlement within the meaning of s. 1, sub-s. 1, of the Settled Land Act, 1925, and by virtue of s. 31, sub-s. 1, the trustees of the settlement under the will (when appointed for the purposes of the Act) become trustees of such compound settlement for the purposes of the Act and as such are the proper persons to execute the principal vesting deed required by the Second Schedule para. 1, sub-para. 2.

ORIGINATING SUMMONS.

By his will, dated April 12, 1844, E. C. H. appointed and devised land to the use of a nephew for life with remainder in tail, and with remainder to the use of another nephew for life with remainder in tail. The will contained a proviso that if any person to whom the estate tail was thereinbefore appointed or devised, should be born in the lifetime of the testator or in due time after his death, then the appointment and devise were to be revoked, and in lieu thereof the testator devised and appointed the estate and hereditaments comprised in the devise and appointment so revoked, to the use of the person so thereby made tenant in tail for

his life, and after his death to the use of his sons in tail male. The applicant was the tenant for life under the limitations so created, with the original remainders in tail. By an indenture of April 29, 1902, the then tenant in tail in remainder, in conjunction with the proper parties, disentailed the estate, and by an indenture of the following day, made between the proper parties, a resettlement was made. Under the resettlement, and in the events which had happened, the estate became limited to the use of the applicant for life in restoration of his life estate under the will, and his son became tenant in tail in remainder. By an indenture of January 6, 1908, made between the proper parties, the applicant's son became tenant in fee simple in remainder instead of tenant in tail, and by an indenture of January 7, 1908, which was a marriage settlement executed on the marriage of the applicant's son, the estates were, subject to the life interest of the applicant, conveyed to trustees in fee upon trust for sale and to hold the proceeds upon the trusts of an indenture of even date. Under these circumstances the applicant took out this summons asking: (1.) Whether as tenant for life under the 1902 resettlement he had power under the Settled Land Act, 1925, to sell the land subject to the 1902 resettlement; (2.) whether such land was subject to a compound settlement, and if so whether such compound settlement consisted of (*a*) the will and the resettlement, or (*b*) such will and resettlement, and some other, and, if so, what instrument or instruments; (3.) if so, whether such compound settlement was the only settlement in respect of which the applicant could exercise the powers conferred by the Settled Land Act, 1925.

Norman Daynes for the applicant. The applicant can sell as tenant for life under the 1902 resettlement. Sect. 22, sub-s. 2, of the Settled Land Act, 1925, is relied on. Under that section the applicant is capable of exercising all such powers as he could have exercised by virtue of the resettlement if his estate under the will had not been restored or confirmed, but he had been entitled under the resettlement

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only. Those powers are expressed by the sub-section to be additional to the powers exercisable by him in respect of his former estate. Under the proviso to s. 1, sub-s. 1, of the Act, where land is subject to a compound settlement, references in the Act to the settlement, shall mean such compound settlement unless the context otherwise requires. The words "is the subject of a compound settlement" mean "is sold under a compound settlement." Under the old law it was never necessary to give an exhaustive definition of a compound settlement. There might be several, and a tenant for life could take his choice. It might not be necessary to sell under a compound settlement, though it existed.

If the applicant cannot sell as tenant for life the result is: (1.) that the tenant for life has no power to sell except under a compound settlement—presumably under the most comprehensive compound settlement in existence; and (2.) that under the Second Schedule to the Act, para. 1, sub-para. 2, the vesting deed must be made by trustees of the compound settlement in question.

W. M. Hunt for the remaindermen.

H. L. Williams for the trustees of the resettlement.

ASTBURY J. This is a summons in the matter of the Settled Land Act, 1925, taken out by Colonel Cradock, who is the tenant for life of certain settled estates, for the purpose of ascertaining whether, under a resettlement of 1902, he has power to sell the settled land, and also generally for the purpose of ascertaining who are now the proper persons to execute the vesting deed provided for in the Second Schedule to that Act. There is a certain amount of complication about the matter, although I think the actual decision of the issues which have been raised is comparatively simple. [His Lordship stated the facts as substantially set out above.] The applicant claims that he, as tenant for life under the 1902 resettlement, has now the powers of a tenant for life, and that the trustees of that resettlement are the proper persons to execute the principal vesting deed referred to in the

Second Schedule. He bases his contention upon s. 22, sub-s. 2, of the Act, which provides as follows: "Where by a resettlement of settled land any estate or interest therein is expressed to be limited to any person (whether subject or not to any estate, interest, charge or power expressly created or conferred by the resettlement) in restoration or confirmation of his estate or interest under a prior settlement, then, for the purposes of this Act and otherwise, that person is entitled to the estate or interest so restored or confirmed as of his former estate or interest." Now, pausing there, there can be no doubt that under that portion of the sub-section, Colonel Cradock is restored to his life interest under the will, or is confirmed in it or remains such life tenant. Then the sub-section further provides: "And in addition to the powers exercisable by him in respect of his former estate or interest,"—that is in addition to all powers exercisable by him as tenant for life under the will—" he is capable of exercising all such further powers as he could have exercised by virtue of the resettlement, if his estate or interest under the prior settlement had not been so restored or confirmed, but he had been entitled under the resettlement only." Now it is contended that those words give to Colonel Cradock the full powers of a tenant for life under the resettlement, notwithstanding the fact that he is by the same section confirmed in his position as tenant for life with all the powers consequent thereon under the settlement created by the will. I do not think that that is the true construction of this section at all. I think that what it means, as applied to the present case, is that Colonel Cradock was confirmed as regards his life interest under the will, and that if the resettlement contained any further powers exercisable by the tenant for life thereunder, then he is entitled, as tenant for life under the will, to exercise such further or additional powers (if any) as might be given to him under the resettlement. The result, therefore, is, in my judgment, that at the present time the applicant is tenant for life under the settlement created by the will.

Now, capital moneys ought, prima facie, to go to the trustees of the settlement under which the tenant for life so holds.

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In sub-para. 1 of para. 1 of the Second Schedule to the Act, it is provided: "A settlement subsisting at the commencement of this Act is, for the purposes of this Act, a trust instrument." Sub-para. 2 provides: "As soon as practicable after the commencement of this Act, the trustees for the purposes of this Act of every settlement of land subsisting at the commencement of this Act (whether or not the settled land is already vested in them), may and on the request of the tenant for life or statutory owner, shall at the cost of the trust estate, execute a principal vesting deed" therein referred to. It seems to me again clear that the only persons who can execute a vesting deed in this case are the persons who are or may be appointed trustees for the purposes of the Act of the settlement in the present case. Sub-para. 3 provides: "If there are no trustees of the settlement then (in default of a person able and willing to appoint such trustees) an application shall be made to the Court by the tenant for life or statutory owner, or by any other person interested, for the appointment of such trustees." That is the application which is now made. Sect. 13 of the Act provides for dispositions not taking effect until the vesting instrument is made. There are a number of other sections to which I need not refer, and which show the necessity, in order that the Act may be carried out, of the execution of this vesting deed. Under s. 1, sub-s. 1, it is enacted as follows. (1) [His Lordship read

(1) Settled Land Act, 1925, s. 1, sub-s. 1: "Any deed, will, agreement for a settlement or other agreement, Act of Parliament, or other instrument, or any number of instruments, whether made or passed before or after, or partly before and partly after, the commencement of this Act, under or by virtue of which instrument or instruments any land, after the commencement of this Act, stands for the time being—

(i.) limited in trust for any persons by way of succession; or

(ii.) limited in trust for any person in possession—(*a*) for an entailed interest whether or not capable of being barred or defeated; (*b*) for an estate in fee simple or for a term of years absolute subject to an executory limitation, gift, or disposition over on failure of his issue or in any other event; (*c*) for a base or determinable fee or any corresponding interest in leasehold land; (*d*) being an infant, for an estate in

the sub-section.] Now it is plain that in the present case, by virtue of the will and the subsequent documents, this settled land stands limited in trust for persons by way of succession. I do not think it can be doubted that the will, the disentailing deed, the resettlement of 1902, the deed of 1908 under which the applicant's son obtained the fee, and his marriage settlement, constitute a compound settlement within the meaning of s. 1, sub-s. 1, of this statute. Sect. 3 provides that: "Land which has been subject to a settlement shall be deemed for the purposes of this Act to remain and be settled land, and the settlement shall be deemed to be a subsisting settlement for the purposes of this Act so long as—(*a*) any limitation, charge, or power of charging under the settlement subsists, or is capable of being exercised." Here, therefore, there is, under the section I have referred to, a compound settlement, and a vesting deed must, in my judgment, be made by the trustees of that settlement.

Sect. 31, sub-s. 1, provides as follows: "Persons who are for the time being trustees for the purposes of this Act of an instrument which is a settlement, or is deemed to be a subsisting settlement for the purposes of this Act, shall be the trustees for the purposes of this Act of any settlement

> fee simple or for a term of years absolute; or
>
> (iii.) limited in trust for any person for an estate in fee simple or for a term of years absolute contingently on the happening of any event; or
>
> (iv.) limited to or in trust for a married woman of full age in possession for an estate in fee simple or a term of years absolute or any other interest with a restraint on anticipation; or
>
> (v.) charged, whether voluntarily or in consideration of marriage or by way of family arrangement, and whether immediately or after an interval, with the payment of any rentcharge for the life of any person, or any less period, or of any capital, annual, or periodical sums for the portions, advancement, maintenance, or otherwise for the benefit of any persons, with or without any term of years for securing or raising the same;
>
> creates or is for the purposes of this Act a settlement and is in this Act referred to as a settlement, or as the settlement, as the case requires:
>
> Provided that, where land is the subject of a compound settlement, references in this Act to the settlement shall be construed as meaning such compound settlement, unless the context otherwise requires."

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constituted by that instrument and any instruments subsequent in date or operation." In other words, the trustees of the will, when appointed for the purposes of the Act, in this case become ipso facto on their appointment, trustees for the purposes of the Act of the compound settlement that I have referred to. Under one of the forms of vesting instrument, contained in the First Schedule, Form No. 1, it is provided that the trustees, in executing the vesting deed, shall thereby declare that: "All and singular the hereditaments and premises respectively mentioned in the First and Second Schedules hereto and all other (if any) the premises capable of being vested by this declaration which are now by any means subject to the limitations of the recited settlement are vested in the said [tenant for life]," and so on, and the vesting deed, if it refers to the settlement, as I have decided, will be a vesting deed complying with the requirements of the statute.

[His Lordship then dealt with the question as to who should be appointed trustees of the will for the purposes of the Settled Land Act, 1925, and directed that the matter should be referred to chambers for discussion.]

Solicitors: *Moon, Gilks & Moon, for Houlditch, Anstey & Thompson, Exeter; Hasties.*

A. R. T.

TOMLIN J.
1926
June 2, 3.

In re GLYNCORRWG COLLIERY COMPANY, LIMITED.

RAILWAY DEBENTURE AND GENERAL TRUST COMPANY, LIMITED *v.* THE COMPANY.

[1925. G. 826.]

Company—Debenture Holders' Action—Insufficient Assets—Order of Administration of Assets—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *ss.* 107, 209.

In an action brought by the plaintiffs, as first debenture holders of a colliery company, on behalf of themselves and all other first debenture holders, a receiver and manager was appointed on April 7, 1925, and he carried on the company's colliery under the direction of the Court until July 31, 1925, when it was closed down. In November, 1925, the usual order in a debenture holders' action was made, but on the assets being got in, they proved insufficient to pay the plaintiffs' costs, the costs and remuneration of the trustees under the debenture trust deed, the receiver's remuneration and the preferential creditors, who consisted chiefly of injured workmen having claims for compensation under the Workmen's Compensation Acts. Under the particular debenture trust deed the trustees' remuneration was with their costs and expenses a first charge on the money to arise from the realization of the debenture holders' security:—

Held, that the assets were applicable in the following order: (1.) costs of realization; (2.) costs, including remuneration of the receiver; (3.) costs, charges and expenses of debenture trust deed, including the trustees' remuneration; (4.) the plaintiffs' costs of action; (5.) preferential creditors; and (6.) the debenture holders.

Summons in a debenture holders' action.

The plaintiffs were the holders of 8960*l.* debenture stock out of 50,000*l.* 6 per cent. first debenture stock issued by the above named colliery company, of which 39,040*l.* stock was outstanding. The debentures were secured by a principal debenture trust deed and two supplementary debenture trust deeds dated November 9, 1903, July 6, 1905, and July 5, 1913, respectively, which created a floating charge upon the assets of the company. On April 1, 1925, the plaintiffs' suing on behalf of themselves and all other first debenture

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holders, brought an action to enforce their security. On April 7, 1925, an order was made for the appointment of an interim receiver and manager, and it was ordered that the receiver and manager should "forthwith out of any of the assets coming to his hands pay the debts of the defendant company which have priority over the claims of the first debenture stock holders." The business of the defendant company was carried on by the receiver and manager under the direction of the Court until July 31, 1925, when in the absence of a purchaser the business was shut down. On November 24, 1925, the usual order in a debenture holders' action was made, but in the course of taking the usual accounts and inquiries it became apparent that the assets would not be sufficient to pay the plaintiffs' costs, the receiver's remuneration, the costs and remuneration of the trustees under the debenture trust deed and the preferential creditors, and that if these were all payable in priority to the debenture holders there would be nothing left for them. The principal reason for this was that the preferential claims included a sum of over 24,000*l.*, the estimated amount of sums payable to workmen under the Workmen's Compensation Acts, 1906 to 1923.

Clause 13 of the principal debenture trust deed provided that the trustees should hold the money to arise from any sale or conversion of the property comprised in the security upon trust in the first place to pay or retain the costs and expenses (including their own remuneration) incurred in or about the execution of the trusts; and clause 23 fixed that remuneration.

The summons was taken out by the plaintiffs to have it determined whether all or any or which of the following were entitled to priority over the payments to preferential creditors, and if so, in what order inter se—

(*a*) The plaintiffs' costs of the action as between solicitor and client.

(*b*) The costs in the action of the trustees under the debenture trust deeds as between solicitor and client.

(*c*) The receiver's remuneration and costs and payments

made or to be made by him as receiver and manager or as receiver.

(*d*) The costs, charges, and expenses of the trustees under the debenture trust deeds, including their remuneration.

W. M. Hunt for the summons. The question here is as to the order in which the assets ought to be administered in view of the fact that they are insufficient, and having regard to the Companies (Consolidation) Act, 1908, s. 107. This question is considered in *Batten* v. *Wedgwood Coal and Iron Co.* (1)

[TOMLIN J. Is not the real question as to the claims of the preferential creditors ?]

That is so, and it depends on s. 107 in view of the fact that there is no winding up. In the case of a winding up s. 209 applies. The obligation of a receiver and manager appointed by debenture holders is discussed in *Woods* v. *Winskill.* (2)

It was the duty of the receiver and manager here to pay the preferential creditors out of the first moneys coming to his hand.

Gordon Brown for the receiver and manager. The effect of s. 107 is not to put the receiver under an obligation to pay the preferential creditors out of assets the moment any reach his hands. That is not what is meant by " shall be paid forthwith out of any assets coming to the hand of the receiver." This is made clear when the history of this section and of s. 209 is traced. The Bankruptcy Act, 1883, s. 40, provided that in the distribution of the property of a bankrupt certain debts were to be paid in priority to all others. That was extended in the Preferential Payments in Bankruptcy Act, 1888, s. 1, sub-s. 1, to apply also to the distribution of the assets of any company in winding up. Its effect was considered in *Richards* v. *Kidderminster Overseers.* (3) Then came the Preferential Payments in Bankruptcy Amendment Act, 1897, and here in ss. 2 and 3 are to be found what are now in substance ss. 107 and 209 of the Companies (Consolidation) Act, 1908, and the new s. 3 (now s. 107) was inserted because of the decision in *Richards* v. *Kidderminster Overseers* (3)

(1) (1884) 28 Ch. D. 317. (2) [1913] 2 Ch. 303, 309, 311.
(3) [1896] 2 Ch. 212, 217.

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that the previous section did not affect persons who held security upon assets of the company charged in their favour. The word "forthwith" appeared in s. 3, and ss. 2 and 3 were meant to create identical preferential claims in the two different sets of circumstances, and not under s. 3 to give a better right to immediate payment than under s. 2.

The provision as to paying "forthwith" out of assets was directed merely to showing that the receiver need not wait till he had ascertained the claims of other creditors before paying the preferential creditors, and not that preferential creditors were to be paid at once. Sects. 107 and 209 were meant to have the same effect in regard to payment of preferential claims in the two different circumstances of a receiver for debenture holders being appointed of a company not then in course of winding up, and of the company being in course of winding up: see *Westminster Corporation* v. *Chapman* (1) in regard to priorities.

L. W. Byrne for an injured workman. The order of administration is discussed in a note in the Annual Practice, 1926, p. 2339. Neither of the reported cases cited in support of it have any real bearing. The receiver ought to have paid the preferential creditors out of any asset as soon as he received it both under s. 107 and the order appointing him. It was his duty to do this before he started carrying on the company's business and applying assets for this purpose: *Woods* v. *Winskill*. (2) He ought to have paid them out of the first liquid assets reaching him.

[TOMLIN J. said the Master's note in *In re Brooker & Goss, Ld.* (3), referred to in the note in the Annual Practice, 1926, had been found and afforded support for that note.]

The question as to the form of order in regard to preferential creditors was considered in *In re Meaby & Co.* (4), and the form of order in a debenture holders' action in this respect when the debentures constitute a floating charge was laid down in *In re Wolverhampton District Brewery, Ld.* (5), and a Practice

(1) [1916] 1 Ch. 161.
(2) [1913] 2 Ch. 303.
(3) Unreported.
(4) [1899] W. N. 58.
(5) [1899] W. N. 229.

Note headed *In re Debenture Holders' Actions* (1), and included a direction for the receiver to pay them forthwith out of assets coming to his hands.

Brough for the trustees under the debenture trust deed. The question of the trustees' remuneration is dealt with in the trust deed, and made a first charge on the proceeds of property charged: compare *In re Piccadilly Hotel, Ld.* (2), and *Debenture Corporation, Ld.* v. *Uttoxeter Brewery, Ld.* (3)

TOMLIN J. The question which arises in this case is as to the order in which the assets which have been realized by means of the action are applicable in discharging the costs in the action of the plaintiffs, of the defendants, the trustees of the trust deed, the receiver's remuneration and costs, and the claims of preferential creditors, having regard to the fact that the amount realized is insufficient to pay the total of all those claims, and necessarily, therefore, insufficient to provide anything for the debenture holders at all.

The plaintiffs in the action are suing on behalf of themselves and the holders of first debentures issued by a company and secured by a deed which is dated in November, 1903, and under clauses 13 and 23 of which provision is made for payment to trustees of remuneration. Clause 13 provides that the first trust on realization shall be to pay and retain the costs and expenses of the trustees, including their own remuneration. The trust deed contains a floating charge, but no specific charge. There is a subsequent issue of debentures, the trustees of the trust deed securing which are also defendants to the action. In that trust deed, which is subject in all respects to the floating charge created by the trust deed securing the first debentures, there is a specific charge in favour of the second debentures upon the goodwill and certain other assets of the business, with a general floating charge in addition.

The company carries on the business of a colliery company, and after the commencement of the action a receiver and

(1) [1900] W. N. 58.
(2) [1911] 2 Ch. 534.
(3) (1895) Noted in Palmer's Company Precedents, 12th ed., Part III., p. 94.

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manager was appointed. That was in April, 1925, and the order appointing him was in the usual form, containing a direction to pay preferential claims out of assets received. Under the direction of the Court the receiver and manager carried on the colliery until July 31, 1925, when it was closed down, and on November 24, 1925, there was the usual judgment under which the accounts have been proceeded with. The assets have been realized, and, as I say, the result of the realization is that there is not sufficient to pay the total of those expenses and costs to which I have referred, and the preferential claims. The preferential claims are the claims of workmen in respect of injury, and they amount to a very considerable sum—something like 25,000*l.*—and it is the magnitude of those claims which give rise to the question that I have to decide.

The point arises under s. 107, sub-s. 1, of the Companies (Consolidation) Act, 1908, which provides: "Where, in the case of a company registered in England or Ireland, either a receiver is appointed on behalf of the holders of any debentures of the company secured by a floating charge, or possession is taken by or on behalf of those debenture holders of any property comprised in or subject to the charge, then, if the company is not at the time"—that means at the time when the receiver is appointed or possession is taken—"in course of being wound up, the debts which in every winding up are under the provisions of Part IV. of this Act relating to preferential payments to be paid in priority to all other debts, shall be paid forthwith out of any assets coming to the hands of the receiver or other person taking possession as aforesaid in priority to any claim for principal or interest in respect of the debentures." Under Part IV. of the Act, s. 209, sub-s. 1, it is provided: "In a winding up there shall be paid in priority to all other debts"—and then follows a list of things which include (sub-clause (*d*)) claims of the kind with which we are concerned in this action—namely, compensation for injury. Sub-s. 2 of the section is as follows: "The foregoing debts shall:—(*a*) rank equally among themselves and be paid in full, unless the assets are insufficient

to meet them, in which case they shall abate in equal proportions; and (*b*) in the case of a company registered in England or Ireland, so far as the assets of the company available for payment of general creditors are insufficient to meet them, have priority over the claims of holders of debentures under any floating charge created by the company, and be paid accordingly out of any property comprised in or subject to that charge." Taking that section alone, it seems to be reasonably plain that in a case where there had been no debenture holders' action and the company was being wound up, the effect of this section would be that the preferential claimants, where the fund available for payment of general creditors was insufficient to provide for them in full, would be entitled to have their claims paid out of the fund which would otherwise be available for debenture holders whose debentures were secured by a floating charge. So far, then, as a winding up is concerned, there is by virtue of that section no alteration in the order in which the assets are applicable, except that preferential creditors are to be satisfied before any fund subject to a floating charge can be utilized for payment of those who have the benefit of the floating charge.

It remains to consider the meaning of s. 107. It is to be observed that the section is only applicable if when the receiver is appointed or possession is taken, the company is not being wound up. Therefore if the company is being wound up, when the receiver is appointed or action taken, s. 209 will apply; if, on the other hand, there is no pending winding up, s. 107 will apply. Prima facie one would not expect the two sections to have a different operation, seeing that the application of the one or the other is dependent on the fortuitous circumstance whether the winding up or the institution of a debenture holders' action was the first event. There seems no logical reason why the happening of one of those events in front of the other should alter the distribution of the assets, and I think one would approach the construction of s. 107 with that measure of prejudice, that one would expect to find that the scheme of distribution under the two sections was in accord. This is still more the

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case when one examines the history of this legislation. Originally the principle involved applied only to bankruptcy, and in the Bankruptcy Act, 1883, which contains, I think, the earliest section in regard to it, s. 40 provides: "In the distribution of the property of a bankrupt there shall be paid in priority to all other debts" certain preferential claims. Again, in s. 1, sub-s. 1, of the Preferential Payments in Bankruptcy Act, 1888, the phrasing is: "In the distribution of the property of a bankrupt, and in the distribution of the assets of any company being wound up under the Companies Act, 1862"—that brings in the winding up of a company for the first time—"there shall be paid in priority to all other debts" certain preferential claims. Up to that point, then, it is quite plain that the Legislature is only altering the priority of debts. Next comes the Preferential Payments in Bankruptcy Amendment Act, 1897, where the matter is dealt with in two successive sections, the second and the third. Sect. 2 is in these terms: "In the winding up of any company . . . . the debts mentioned in s. 1 of the Preferential Payments in Bankruptcy Act, 1888, shall, so far as the assets of the company available for payment of general creditors may be insufficient to meet them, have priority over the claims of holders of debentures or debenture stock under any floating charge created by such company, and shall be paid accordingly out of any property comprised in or subject to such charge." That is substantially s. 209 of the Act of 1908. Then s. 3 provides: "In case a receiver is appointed on behalf of the holders of any debentures or debenture stock of a company secured by a floating charge, or in case possession is taken," then "in either of such cases, if the company is not at the time in course of being wound up, the debts mentioned in s. 1 of the said Preferential Payments Act shall be paid forthwith out of any assets coming to the hands of the receiver, or other person taking possession as aforesaid, in priority to any claim for principal or interest in respect of such debentures or debenture stock. . . . . But any payments made under this section shall be recouped as far as may be out of the assets of the company available for payment

of general creditors." The word "forthwith" appears in that section, and it is suggested that the section really means more than that the preferential debts are to be paid "forthwith out of any assets . . . . in priority to any claim on behalf of the debenture holders," and that it really means that they are to be paid out of every asset which comes to the hand of the receiver quite irrespective of any other claims which are in existence against the assets of the company. Now either that must give preferential debts an absolute priority over everything else in respect of assets of every kind that come into the receiver's hands, or it must only mean that the preferential claimants are given priority over that which is expressly referred to—namely, the principal and interest of the debenture holders. I think that looking at that Act of 1897 and the position of the two sections, it is easy to see that the Legislature there is contemplating two alternatives, and desiring to produce the same result in each case. And reading those two sections together, I have no hesitation in coming to the conclusion that on their true construction the effect is the same whether the first event be a winding up or the appointment of a receiver, and that s. 3 only contemplates payment of preferential claims "forthwith out of any assets coming to the hands of the receiver in priority to any claim for principal or interest." What it means is that out of assets available for the payments of principal and interest of the debenture holders, the claims of preferential creditors are to be paid forthwith irrespective of the claims of debenture holders.

Holding as I do that view in regard to ss. 2 and 3 of the Preferential Payments in Bankruptcy Amendment Act, 1897, I feel unable to come to any different conclusion upon ss. 107 and 209 of the Act of 1908, even though they are separated by about a hundred sections in the latter Act. I come therefore to the conclusion that they are two sections which are intended in two different sets of circumstances to produce substantially the same result, and that on the true construction of s. 107 the only direction to the receiver or person taking possession is that he shall at the earliest possible moment

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pay out of the assets which would otherwise go to the debenture holders in discharge of their principal and interest the claims of preferential creditors. When this has been done, then under sub-s. 3 the debenture holders will have a right to recoupment out of any assets of the company available for payment of general creditors.

It has been said that this section was construed in a different sense by Astbury J. in *Woods* v. *Winskill* (1), but I do not think myself that that case has anything to do with the question with which I am concerned. In that case a receiver and manager had been appointed under the terms of a trust deed by the debenture holders themselves, and such receiver and manager having carried on the company's business as its agent, either by himself doing so or by allowing the company's managing director to do so, claims arose against the company in respect of that carrying on of the business. The question then arose whether the receiver was liable to preferential creditors for having applied the assets in satisfaction of creditors whose claims had arisen in the carrying on of the business. I confess I find it a little difficult to see upon what ground he was to escape liability.

The argument went upon the measure of his statutory duty, and as I understand the learned judge, it had been argued before him that such statutory duty was only to avoid paying the assets in discharge of the principal and interest of the debenture holders in front of the preferential claims, and that it was not a breach of his statutory duty to misapply, or rather that the ambit of his statutory duty did not extend to preclude him from misapplying the assets in some other direction. That seems to have been the nature of the argument. Perhaps it is hardly necessary to say that the argument failed, and that the receiver was held to be liable. He was held to be liable not by reason of any question such as that which I am considering here to-day, but because he had in fact upon any view of the section plainly misapplied the assets. I think, therefore, that that case affords no assistance in determining the present question.

(1) [1913] 2 Ch. 303.

I do, however, derive a measure of comfort and support from a passage in the Annual Practice, 1926, where it is stated at p. 2339, "Distribution of assets" in debenture holders' actions, "When the assets are deficient the order in which the funds ought to be distributed has been held to be as follows: 1. Costs of realisation, including costs of an abortive attempt to sell. . . . . 2. Costs due to solicitors of debenture trustees before action brought, and for which they had a lien on the title deeds. 3. Balance due to receiver and manager, including his remuneration and costs. 4. Costs, charges and expenses of trustees of debenture deed. 5. Plaintiffs' costs of action. 6. Preferential debts. 7. Debenture Holders." There are cited for that three authorities: *Batten* v. *Wedgwood Coal and Iron Co.* (1), which I do not think really goes to this point at all; *In re Healy* (2), an Irish case which I have not seen, but which I am told by counsel does not really assist matters; and *In re Brooker & Goss, Ld.* (3), which came before Swinfen Eady J. in chambers on March 19, 1906. I have caused search to be made in chambers, and I have now before me the Master's minute book, and it appears under date March 19, 1906, that the action referred to in that note came before Swinfen Eady J. in chambers. The Master's note is this: "In a debenture holders' action when there is a deficiency the following is the order in which assets should be applied: (1.) Costs of realization; (2.) Remuneration of receiver; (3.) Plaintiff's costs of action; (4.) Preferential creditors; (5.) Debenture holders' principal and interest"; and then there follow these words: "So stated to me by Swinfen Eady J. in this case." As to what the particular force of that note may be, I express no opinion; but I am justified in feeling that I derive some support from the fact that it contains an expression by Swinfen Eady J. of an opinion which accords with the conclusion at which I arrive to-day.

I ought perhaps to add that as far as the debenture holders' trustees are concerned, their remuneration is in the same position as their costs, charges and expenses having regard to

(1) 28 Ch. D. 317. (2) [1918] 1 I. R. 366.
(3) Unreported.

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the terms of the trust deed. I must, therefore, hold that the order in which the assets are applicable are: First, costs of realization; secondly, the costs including remuneration of receiver; thirdly, the costs, charges and expenses of the debenture trust deed including the trustees' remuneration; fourthly, the plaintiffs' costs of action; fifthly, preferential creditors; and sixthly, the debenture holders, but I understand that there will be no balance for them.

Solicitors: *Norton, Rose & Co.; Ingledew, Brown & Co.; Smith, Rundell, Dods & Bockett, for Morgan, Bruce & Nicholas, Pontypridd.*

H. C. G.

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In re WAIT.

[15 of 1926.]

Bankruptcy—Contract of Sale—C.i.f.—One moiety of specific Goods about to be shipped—Payment of purchase Money—Subsequent Bankruptcy of Vendor—No Appropriation of Moiety—Specific Performance against Trustee—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *ss.* 52, 62.

By a c.i.f. contract of November 20, 1925, Wait bought 1000 tons of a special wheat ex *Challenger*, expected to load in December at Oregon.

By a c.i.f. contract of November 21 Wait sold 500 tons of this parcel to sub-purchasers.

The wheat was shipped in bulk at Oregon on December 21, and a bill of lading for the 1000 tons forwarded to Wait, who received it on January 4, 1926. The purchase money was due on February 6—i.e., thirty-three days after sight—and on February 5, although there was no bill of lading for the 500 tons which were never appropriated, the sub-purchasers gave Wait their cheque for their 500 tons less the half freight payable at destination.

Wait having paid this cheque to his bank and hypothecated the 1000 tons bill of lading became a bankrupt before the ship arrived.

The trustee having redeemed this bill of lading claimed to retain the entire 1000 tons, leaving the sub-purchasers their remedy in damages:—

Held, that though, for want of appropriation, the property in the 500 tons had not passed to the sub-purchasers, those 500 tons were specific goods within s. 52 of the Sale of Goods Act, 1893, as defined by s. 62, and the Court had jurisdiction to order specific performance of the contract.

Holroyd v. *Marshall* (1861) 10 H. L. C. 191, 209; *Hoare* v. *Dresser* (1859) 7 H. L. C. 290, 311, 317, 318; *Howell* v. *Coupland* (1874) L. R. 9 Q. B. 462, 465; (1876) 1 Q. B. D. 258, 262 and *Jones* v. *Earl of Tankerville* [1909] 2 Ch. 440, 445 applied.

Thames Sack and Bag Company v. *Knowles & Co.* [1918] W. N. 176; 88 L. J. (K. B.) 585; *Hayman & Son* v. *M'Lintock* 1907 S. C. 936 and *Laurie* v. *Dudin & Sons* [1926] 1 K. B. 223 distinguished.

Held, also, that as the remedy in damages would in the circumstances be more or less abortive the Court ought to grant specific performance.

APPEAL from Bristol County Court.

By a c.i.f. contract of November 20, 1925, Wait (trading as Wait & James, Bristol) bought from Balfour Williamson & Co., London, 1000 tons of Western White wheat ex motor vessel *Challenger*, expected to load between December 16 and 31, 1925, from Oregon or Washington. The price was 57*s.* per 480 lbs.

By a c.i.f. contract of November 21, 1925, Wait sold 500 tons of this parcel by the same description and at the same price to Humphries & Bobbett, Bristol (hereinafter called "the sub-purchasers"), adding: "The wheat sold is part of a parcel bought from Balfour Williamson & Co. under contract dated November 20, and in the event of their not duly fulfilling same, it is understood that Messrs. Wait & James are not to be held liable to buyers."

The wheat was shipped in bulk on the *Challenger* by Balfour Williamson & Co.'s agent at Oregon on December 21, 1925, and a bill of lading of that date for the 1000 tons was issued. The freight was 1500*l.* This bill of lading was received by Wait on January 4, 1926, and the purchase price was payable on February 6—i.e., thirty-three days after sight.

On January 5, 1926, Wait delivered to the sub-purchasers a provisional invoice for their 500 tons, the price of which, less 750*l.* half freight payable at destination, was 5933*l.*, due February 6. On February 2 he delivered a confirmatory invoice, and on February 5 the sub-purchasers gave him a cheque for the 5933*l.*

On February 6 Wait paid this cheque of 5933*l.* with other cheques totalling 12,168*l.* into his bank. At the same time he hypothecated the above bill of lading and two bills of lading relating to two other shipments to the bank to secure his overdraft. He then had only one general account.

On February 9—i.e., three days later—the bank on its own initiative and without any request from Wait opened

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three loan accounts relating to the three shipments. Account No. 1, which related to the 1000 tons transaction, commenced with a credit of the 5933*l.* cheque and a debit of 11,797*l.* transferred from the general account, against which debit the 1000 tons bill of lading was held.

On February 17, 1926, Wait gave notice of suspension of payment, and on February 24 he was adjudicated bankrupt on his own petition, and Collins was appointed special manager by the official receiver.

On February 26 the sub-purchasers sent Collins a cheque for 750*l.*, the half freight, but he returned it by the official receiver's instructions.

On February 27, 1926, Collins, as special manager, discharged the 11,797*l.* debit, and received the 1000 tons bill of lading, leaving No. 1 account in credit 5933*l.*

On February 28 the *Challenger* arrived at Avonmouth with the 1000 tons in bulk. The sub-purchasers' 500 tons had never been appropriated.

On March 3 the sub-purchasers issued a notice of motion in the Bristol County Court asking that the trustee (then the official receiver) should specifically perform the contract of November 21, 1925, by delivering 500 tons out of the 1000 tons of wheat on the *Challenger* to the sub-purchasers on payment of the 750*l.* half freight. Alternatively they asked for an order for repayment of the 5933*l.* purchase money or alternatively for a declaration that they had a beneficial interest in the parcel of wheat to the extent of 500 tons, and a charge upon the wheat and the bill of lading for the 5933*l.* purchase money.

On March 5 Collins was appointed trustee. He was subsequently made a respondent. At the date of the motion some of the wheat had been disposed of, but 530 tons were left, the 500 being still unappropriated.

On March 13, 1926, the county court judge held that the 500 tons were not "specific" or "ascertained" goods within the authorities, and he could not order specific performance, but holding that the 5933*l.* purchase money was in the nature of a trust fund earmarked for a specific purpose, and that in

any case it was unconscionable of the trustee, as an officer of the Court, to keep both the goods and the purchase money, he ordered the trustee to repay that amount.

On March 31 the trustee gave notice of appeal, and on April 1 the sub-purchasers gave a cross notice asking for specific performance if it were held that the county court judge's order for repayment could not stand.

Clayton K.C. and *Croom-Johnson* for the trustee. We are appealing against the order for repayment of the purchase money. It will probably be more convenient to take the specific performance point first. On that point we merely submit that there is no case, and leave the sub-purchasers to make one.

Luxmoore K.C. and *Wethered* for the sub-purchasers. Our contract was for 500 out of 1000 tons of specific wheat to be loaded on a named ship. That was a contract for specific though unascertained goods, and being a c.i.f. contract we had an equitable interest from the start.

Sect. 52 of the Sale of Goods Act, 1893, enables the Court, if it thinks fit, to grant specific performance of a contract to deliver "specific" or "ascertained" goods, and by s. 62, sub-s. 1, unless the context or subject-matter of the Act otherwise requires, "specific goods" means "goods identified and agreed upon at the time" of the contract, and "future goods" means "goods to be manufactured or acquired by the seller" after the contract.

The distinction between "specific" and "generic" goods is well known, and must be borne in mind in every case: Chalmers on Sale of Goods, 10th ed., p. 153.; *Holroyd* v. *Marshall* (1); *Hoare* v. *Dresser* (2); *Howell* v. *Coupland*. (3) The last case is codified by s. 7: see Benjamin on Sale, 6th ed., p. 165 and Halsbury's Laws of England, vol. xxv., p. 121., note (*c*).

In the Court below the trustee relied on *Thames Sack and Bag Co.* v. *Knowles & Co.* (4) But in that case the contract was for purely "generic" goods. It was not contended that

(1) 10 H. L. C. 191, 209.
(2) 7 H. L. C. 290, 311, 317, 318.
(3) L. R. 9 Q. B. 462, 465; 1 Q. B. D. 258, 262.
(4) [1918] W. N. 176; 88 L. J. (K. B.) 585.

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they were "specific," and the Court held that they were not "ascertained." In *Laurie* v. *Dudin & Sons* (1) the defendants were only the warehousemen. The only question was whether the property had passed under s. 16. No case for specific performance under s. 52 was raised.

The Court can grant specific performance, although the property has not passed: *Jones* v. *Earl of Tankerville* (2); even against a trustee in bankruptcy: *Pearce* v. *Bastable's Trustee.* (3)

Clayton K.C. and *Croom-Johnson* in reply. In contracts for the sale of goods (unlike contracts for the sale of land) either the legal property or nothing passes. In the latter case the purchaser may have a remedy in damages for breach of contract, but he has no equitable interest in rem on which to found a claim for specific performance. *Pearce* v. *Bastable's Trustee* (3) was the case of a sale of leaseholds. In the case of goods, no scintilla of property passes till the goods are ascertained: s. 16; and they are not ascertained until appropriation: *Hayman & Son* v. *M'Lintock* (4); *Laurie* v. *Dudin & Sons.* (1)

The Sale of Goods Act, 1893, is a codifying Act, and the authorities before January 1, 1894, when it came into operation, are not relevant to its construction, unless a provision is of doubtful import: *Bank of England* v. *Vagliano.* (5)

Holroyd v. *Marshall* (6) is criticized in Fry on Specific Performance, 6th ed., p. 38. *Howell* v. *Coupland* (7) was a case of a contract becoming impossible through the specific goods perishing. It applied the principle of *Taylor* v. *Caldwell* (); see Benjamin on Sale, 6th ed., p. 165. The goods perished before the risk passed to the buyer, and the contract was avoided. This is adopted by s. 7. But in the present case, under the c.i.f. contract the risk passed to the sub-purchasers at the start, and if the *Challenger* had foundered they could still have obtained damages.

The prima facie definition of "specific goods" in s. 62

(1) [1926] 1 K. B. 223.
(2) [1909] 2 Ch. 440, 445.
(3) [1901] 2 Ch. 122.
(4) 1907 S. C. 936.
(5) [1891] A. C. 107, 145.
(6) 10 H. L. C. 191, 209.
(7) L. R. 9 Q. B. 462, 465; 1 Q. B. D. 258, 262.
(8) (1863) 3 B. & S. 826, 833.

can be read into s. 7 without difficulty. Sect. 7 only mentions specific goods. But s. 52 speaks of "specific or ascertained" goods, and, if the definition is read into that section, the words "or ascertained" become meaningless. Even if they could mean "subsequently ascertained" that is not the case here.

In *Jones* v. *Earl of Tankerville* (1) the contract was for the sale of specific ascertained timber. Parker J. evidently treated the words "specific" and "ascertained" as synonymous, and although the property in the specific timber did not pass till the purchasers severed it, they were clearly entitled to specific performance under s. 52.

Assuming, however, that s. 52 applies to this contract, this is not a proper case for specific performance. There is nothing special in Western White wheat. The sub-purchasers could have bought it elsewhere. The Court does not grant specific performance of chattel contracts where the chattel is an ordinary article of commerce and of no special value or interest and where damages would fully compensate: *Whiteley* v. *Hilt* (2); *Cohen* v. *Roche* (3); *Pooley* v. *Budd.* (4) On this point the vendor's pecuniary position is wholly immaterial.

[LAWRENCE J. I should have thought it most material. What is the use of a judgment for damages against an insolvent vendor? Unless you have an authority I am against you on this point.]

The sub-purchasers would have a right of proof for their damages. Specific performance will place them in a more favourable position than other creditors. Why should it be granted merely because their vendor has become bankrupt?

Sect. 61, sub-s. 1, expressly saves the rules in bankruptcy relating to contracts of sale from the operation of the Act.

It must be remembered that the sub-purchasers' payment in this case was purely voluntary. In a c.i.f. contract payment is made in exchange for the shipping documents. Here there were no shipping documents relating to the 500

(1) [1909] 2 Ch. 440, 445.
(2) [1918] 2 K. B. 808, 819.
(3) [1926] W. N. 213.
(4) (1851) 14 Beav. 34, 43.

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tons. In any case the sub-purchasers could have delayed payment, and become liable for interest after the prompt date.

ASTBURY J. [after stating the facts]. The first question relative to the specific performance point is whether the goods in question bought by the sub-purchasers were "specific goods" within s. 52. The contract was for 500 tons out of a specified 1000 tons of a special kind of wheat bought from a particular firm and to be shipped by that firm or their agents on a particular vessel. The sub-purchasers contend that this is a contract for the delivery of "specific goods" within s. 52, which enables the Court, if it thinks fit, to decree specific performance of any contract to deliver "specific" or "ascertained" goods.

By s. 62, sub-s. 1, unless the context of the Act or the subject-matter otherwise requires, "specific goods" means "goods identified and agreed upon at the time" of the contract.

Now in the present case it is quite true that at the date of this contract the goods had not been shipped, so that the contract was only dealing with a specified portion of a future specified shipment. The first question therefore which arises is whether the element of futurity and the fact that the goods bought were only a definite though unappropriated part of a larger parcel prevent the goods being specific within s. 52.

In *Holroyd* v. *Marshall* (1) Lord Westbury said: "A contract for valuable consideration, by which it is agreed to make a present transfer of property, passes at once the beneficial interest, provided the contract is one of which a Court of Equity will decree specific performance. . . . And this is true, not only of contracts relating to real estate, but also of contracts relating to personal property, provided that the latter are such as a Court of Equity would direct to be specifically performed. A contract for the sale of goods, as, for example, of 500 chests of tea, is not a contract which would be specifically performed, because it does not relate

(1) 10 H. L. C. 191, 209.

to any chests of tea in particular; but a contract to sell 500 chests of the particular kind of tea which is now in my warehouse in Gloucester, is a contract relating to specific property, and which would be specifically performed. The buyer may maintain a suit in equity for the delivery of a specific chattel when it is the subject of a contract, and for an injunction (if necessary) to restrain the seller from delivering it to any other person."

In Fry on Specific Performance, 6th ed., p. 38, the learned author, after referring to this passage, proceeds: "It may be doubted whether this dictum did not express a more complete system of jurisprudence than that which this country possessed at the time when it was uttered, and whether the records of the Court of Chancery contained many bills for the specific performance of contracts relating to specific chattels of a mercantile value like tea. But by s. 52 of the Sale of Goods Act, 1893, it has been enacted that"— and then he refers to that enactment with a very obvious meaning.

Now Lord Westbury's distinction between specific and generic goods is perfectly plain.

In *Hoare* v. *Dresser* (1), where another factor was added, the headnote states that: "If there has been an engagement to appropriate to a certain individual a particular cargo, or a particular part of a larger cargo, as, for example, '100 quarters of wheat out of 500 quarters which I have now sent,' in either of these cases equity will interfere to enforce performance of the engagement; but though the person who has made an engagement to sell a certain quantity of property, may be shown to possess such a quantity of that property, equity will not treat the property so possessed as available for the engagement." Lord Chelmsford said (2): "But the question in equity is not whether the property in the cargoes actually passed to Dresser, so as to give him a legal right, but whether there was not a contract for timber which, though general at first, was, by the subsequent transactions between the parties, rendered specific, so as to enable Dresser to assert

(1) 7 H. L. C. 290. (2) 7 H. L. C. 311.

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an equitable title to it." Lord Cranworth said (1): "The difference between law and equity I take to be this: that if there has been an engagement to appropriate a particular cargo, or an engagement to satisfy a contract out of a particular thing, such as to appropriate a part of a larger cargo, in either of those cases equity will interfere, in the one case, to decree what in truth is a specific performance, or something very like a specific performance of the contract to appropriate a particular cargo; and, in the other, to give the purchaser a lien upon the larger cargo, in order to enable him to satisfy himself of the smaller demand. . . . . But I apprehend that neither in equity nor in law can there be any jurisdiction to say, that because there is property of the person who ought to have fulfilled his contract, therefore you can make that property available for the specific performance of the engagement." There again the difference between the specific and generic character of a contract is clearly pointed out.

In *Howell* v. *Coupland* (2), where yet another factor—namely, the question of the specific goods coming into existence in the future—was added, the headnote states: "Plaintiff and defendant entered into an agreement in March, whereby defendant agreed to sell and plaintiff to purchase '200 tons of Regent potatoes grown on land belonging to defendant in Whaplode, at rate of 3*l.* 10*s.* 6*d.* per ton, to be delivered in September or October, and paid for as taken away.' In March defendant had 68 acres ready for potatoes, which were sown, and were amply sufficient to grow more than 200 tons in an average year; but in August the potato blight appeared and the crop failed, so that the defendant was able to deliver only 80 tons. The plaintiff having brought an action for the non-delivery of the other 120 tons:—

Held, that the contract was for a portion of a specific crop, and was within the principle of *Taylor* v. *Caldwell* (3), and the contract must be taken to be subject to the implied condition that the parties shall be excused, if, before breach, performance becomes impossible from the perishing of the

(1) 7 H. L. C. 317, 318. (2) L. R. 9 Q. B. 462.
(3) 3 B. & S. 826, 833, 834.

thing without default in the contractor." Blackburn J. said (1): "Looking at these facts and the terms of the contract, it cannot mean anything else than that the plaintiff agrees to purchase and the defendant to sell 200 tons of the particular crop of potatoes which it is expected these 68 acres will produce. If that is the contract, it is a contract for the delivery at a future time of a specific thing, so far as this, that it is for the delivery of a portion of a specific thing. It is just like the case of a contract for the purchase of 10 or 100 tons of a cargo of goods out of a particular ship to arrive, which must be so many tons out of the bulk on board the ship named."

Sect. 7, enacted no doubt to enforce the rule in *Howell* v. *Coupland* (2), provides that where there is an agreement to sell specific goods, and subsequently the goods, without any fault on the part of the seller or buyer, perish "before the risk passes to the buyer," the agreement is thereby avoided.

The trustee relies (inter alia) on *Thames Sack and Bag Co.* v. *Knowles & Co.* (3) But the judgment does not assist him. The contract was for generic goods, and it was not suggested that they were in any sense specific goods. He also relies on *Laurie* v. *Dudin & Sons.* (4) But the only point there decided that is relevant here, was that under a contract like the present, the property does not pass at the date of the contract. No one suggests the contrary.

In *Jones* v. *Earl of Tankerville* (5), relied on by both parties, Parker J. said: "Lastly, in determining the effect of such a contract at law, the effect of the Sale of Goods Act, 1893, has now to be considered. Goods are there defined in such a manner as to include growing timber which is to be severed under the contract of sale, whether by the vendor or the purchaser, and s. 52 of the Act seems to confer on the Court a statutory power of enforcing at the instance of a purchaser specific performance of a contract for the sale of ascertained goods, whether or not the property has passed by the contract." Sect. 52 of course relates to specific or ascertained goods.

(1) L. R. 9 Q. B. 465.
(2) L. R. 9 Q. B. 462, 465.
(3) [1918] W. N. 176; 88 L. J. (K. B.) 585.
(4) [1926] 1 K. B. 223.
(5) [1909] 2 Ch. 440, 445.

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Pearce v. *Bastable's Trustee* (1) decides that specific performance may be enforced against a trustee in bankruptcy if the property in question is still available.

In *Hayman & Son* v. *M'Lintock* (2), also relied on by the trustee, the contract was for generic and not for specific goods. Nothing had been done at the relevant time to separate the goods in question from a larger bulk of which they formed part; no question of specific performance was raised, argued or decided. The only question decided was whether in the events that happened the property had passed.

That is wholly irrelevant to the present case, if the Court holds that this was a contract for specific goods now in the possession or power of the trustee, and can therefore, if it thinks fit, decree specific performance under s. 52.

The trustee contends that no interest in rem passed to the sub-purchasers under the contract, and in default of such an interest specific performance cannot be granted. But if the property passed, specific performance would not be necessary. It is only in cases where the property does not pass, but the contract is for the delivery of specific goods, that specific performance becomes important.

He also contends that the words "specific goods" in s. 52 bear a different meaning to the same words in s. 7, the context and subject-matter of the sections being in his view entirely different. But I can see no context or subject-matter in either section requiring a meaning other than that in s. 62 to be put upon them—namely, "goods identified and agreed upon at the time" of the contract, which in my view was the case here.

For these reasons I am of opinion that the sub-purchasers ought to succeed. The right order will be to discharge the order below, and declare that the sub-purchasers are entitled to specific performance on payment of the 750*l.* half freight, already tendered and refused.

LAWRENCE J. I agree. In order to succeed the sub-purchasers must first of all satisfy the Court that their contract

(1) [1901] 2 Ch. 122. (2) 1907 S. C. 936.

is one of which the Court can direct specific performance. That depends solely upon the proper answer to the question whether the contract is a contract for the delivery of "specific goods" within s. 52—i.e. (per s. 62), "goods identified and agreed upon at the time" of the contract.

The judge below seems to have held that the goods were not specific goods within s. 52, because the sub-purchasers had no such interest in them as would entitle them to specific performance. In this I think he was wrong. The contract could only be performed according to its terms by Wait delivering to his sub-purchasers 500 tons of wheat, part of a particular parcel—namely, 1000 tons of the Western White wheat bought by Wait from Balfour Williamson & Co. under a contract of November 20, which was to be shipped on their behalf on a particular ship, the motor vessel *Challenger*, and if Balfour Williamson & Co. had not had that particular parcel so shipped, Wait's liability to the sub-purchasers would be gone.

The authorities cited establish that the goods comprised in such a contract, although future and unascertained, and although the property in them did not pass by the contract, can nevertheless be and are properly described as "specific goods": see, for instance, *Howell* v. *Coupland*. (1) In such a case it appears that the Court would give the sub-purchasers a lien upon the 1000 tons of the Western White wheat in respect of their purchase of 500 tons of that parcel: *Hoare* v. *Dresser*. (2)

The trustee contends that these cases do not apply to s. 52, but were directed to circumstances or subject-matter similar to that dealt with in s. 7. He says that in those cases the Court was not dealing with specific performance at all, but only with the question whether the agreement was void because of the perishing of the goods without the seller's or buyer's default. He somewhat illogically draws the conclusion that the meaning of "specific goods" in s. 7 is wider than in s. 52. In other words he says that goods

(1) L. R. 9 Q. B. 462, 465; 1 Q. B. D. 258, 262.

(2) 7 H. L. C. 290, 318.

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may be specific for the purpose of s. 7 which are not specific for the purpose of s. 52.

Now in order to succeed in that argument he must establish that the context or subject-matter of s. 7 requires that the definition of s. 62 shall not apply as it stands to that section, but must be extended.

The plain answer is that if the definition is read into s. 7 it makes perfect sense, and s. 7 would still be effectual to carry out its prima facie meaning and intention, and that neither the context nor the subject-matter requires any extension of the meaning of "specific goods."

In the circumstances it seems to me that the sub-purchasers have brought themselves within s. 52, and I also entirely agree that this is a case in which the Court ought to exercise its extraordinary jurisdiction by way of specific performance, and not leave the sub-purchasers to the doubtful remedy of proof for damages in the bankruptcy. I concur in the form of judgment mentioned by my brother.

Leave to appeal.

Solicitors: *Peacock & Goddard, for Bevan, Hancock & Co., Bristol; Hancock & Willis, for Barry & Harris, Bristol.*

G. R. A.

PARKER AND COOPER, LIMITED *v.* READING.

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1926

July 1.

[1925. P. 2066.]

Company—Directors—Irregular Transaction—Ultra vires the Board—Intra vires the Company—Assent of all the individual Corporators—No Meeting.

A company is bound in a matter intra vires the company by the unanimous agreement of all its corporators.

If all the individual corporators in fact assent to a transaction that is intra vires the company, though ultra vires the board, it is not necessary that they should hold a meeting in one room or one place to express that assent simultaneously.

In re George Newman & Co. [1895] 1 Ch. 674, 684, 686 and *In re Express Engineering Works* [1920] 1 Ch. 466, 470 considered, explained, and applied.

WITNESS ACTION.

The above company of boot and shoe manufacturers and dealers was incorporated on February 20, 1918, with a capital of 5000*l.* in 5000 1*l.* shares, all now issued and fully paid. The memorandum authorized the borrowing of money by the issue of debentures.

The company was regulated partly by special articles and partly by Table A.

By special art. 13 the number of directors was to be not less than two nor more than five, the first directors being Arthur Parker, Elizabeth Parker, and Benjamin Ward.

By special art. 17 a director's qualification was 500 shares.

By special art. 18 a director might contract with and be interested in any contract made with the company, and should not be liable to account for any profit thereby made, provided that the precise nature of his interest was declared to the Board when the contract was entered into, but no director was to vote in respect of any contract or arrangement in which he was interested.

By Table A, art. 76, the company's seal was not to be affixed to any instrument except by the authority of a board resolution, and in the presence of at least two directors and the secretary, which two directors and secretary were to sign the instrument so sealed.

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Table A, arts. 78, 79, 81 and 84, contained the usual provisions for retirement by rotation and the filling up of ordinary and casual vacancies.

The business was carried on at first by the three directors, and after Ward's retirement, about March 6, 1920, by Arthur and Elizabeth Parker, who after that date were the only shareholders, Arthur Parker holding 4500 and Elizabeth Parker 500 shares.

Shortly before October 8, 1921, it was arranged to sell the stock of machinery, fixtures and fittings in the factory to the defendant Reading and Botterill for 1600*l.*, on the understanding that the company's remaining assets—i.e., cash in hand, cash at bank and book debts—were to be the sole property of Arthur Parker, who was to pay all accounts due by the firm up to October 3, 1921.

This arrangement was confirmed at a board meeting of October 8, 1921, which also resolved to transfer all the shares to the purchasers in such numbers as the purchasers should decide.

This arrangement, whether regular or not, was carried out, and on December 30, 1921, in pursuance of a board resolution of October 19, 1921, 1875 shares were transferred to the defendant Reading, 625 to his son Reading, junior, 1875 to Botterill, and 625 to his son Botterill, junior.

At a board meeting on January 23, 1922, Arthur and Elizabeth Parker, as directors, passed these transfers and issued new certificates. They then appointed Reading junior, secretary, and the defendant Reading and Botterill directors.

Having no suspicion that there was any irregularity in the transfers or in their appointment as directors, the defendant Reading and Botterill at once took over the company's business and acted as directors. They appointed an accountant—namely, the defendant James—as auditor, and acted throughout on his honest and bona fide advice. The business was carried on at a small loss, but the defendant James thought that with a little assistance the company could be pulled round.

Shortly before August 1, 1924, the company's bank being unwilling to increase the company's overdraft, which on February 1, 1922, the two directors had guaranteed to the extent of 750*l.*, the defendant James was consulted, and on his advice it was arranged that the defendant Reading should advance 1750*l.* to the company, out of which the 750*l.* could be discharged, leaving 1000*l.* for working capital. This advance was to be secured by a 2000*l.* debenture to Reading. This arrangement was discussed between the four shareholders, one with another, from time to time, and they all individually assented. The defendant James then instructed the company's solicitors to draw the debenture.

The arrangement was carried out at a board meeting of August 1, 1924, authorizing the issue of the debenture in exchange for the 1750*l.* cheque from the defendant Reading. The sealing was irregular within Table A, art. 76, as the debenture was first sealed by Botterill and afterwards taken to the defendant Reading's house for signature, but the 1750*l.* cheque was duly paid into the company's account and the 750*l.* overdraft discharged.

On May 22, 1925, the defendant Reading appointed the defendant James receiver under his debenture, and the defendant James took possession of the company's undertaking and assets.

On May 29, 1925, the company passed an extraordinary resolution for voluntary winding up, and appointed the plaintiff, Palmer, liquidator.

On September 23, 1925, the company and the liquidator commenced this action against the defendant Reading and the receiver for a declaration that the debenture and the resolution authorizing its issue and the receiver's appointment were invalid, and for ancillary relief.

They objected that the original appointment of the defendant Reading and Botterill as directors was invalid; that they had in any case ceased to be directors before August 1, 1924; that they were—at all events the defendant Reading was—interested in the resolution authorizing the issue of the debenture and not entitled to vote, and there

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was consequently no quorum at the Board meeting of August 1, 1924, and that the seal was not affixed in the manner prescribed by the articles.

The defendants did not admit any of these irregularities, but their main defence was that every act or matter impugned by the plaintiffs was intra vires the company, and had been adopted and ratified by all the shareholders.

Topham K.C. and *Roger Turnbull* for the plaintiffs. The constitution and acts of the board were wholly irregular. The only real defence is the allegation that the matters impugned were intra vires the company and were adopted and ratified by all the shareholders. That required either a properly convened general meeting: *In re George Newman & Co.* (1), or at the very least a meeting where all the shareholders were present and formalities could be waived: *In re Express Engineering Works.* (2)

The onus of proving this is clearly on the defendants.

Archer K.C. and *Geoffrey Howard* for the defendants. A company is bound in a matter intra vires by the unanimous agreement of all its corporators: Buckley on Companies, 10th ed., p. 166. That statement is based on *In re Express Engineering Works* (2), and the learned author does not suggest that any sort of meeting is necessary. (3) The decision was applied in *In re Oxted Motor Co.* (4); see also *Salomon* v. *Salomon & Co.* (5)

In *In re George Newman & Co.* (1) there was no constat as to what the shareholders would have done if a meeting had been called. Here they all concurred beforehand, and no meeting was necessary.

Topham K.C. in reply. In *In re Express Engineering Works* (2) and *In re Oxted Motor Co.* (4) there were actual meetings of all the shareholders together, and the Court was able to treat them as general meetings. In the present case there were no doubt informal assents of all the shareholders

(1) [1895] 1 Ch. 674, 684, 686.
(2) [1920] 1 Ch. 466, 470.
(3) See also Palmer's Company Precedents, 12th ed., vol. i., p. 28.
(4) [1921] 3 K. B. 32, 39.
(5) [1897] A. C. 22, 57.

individually, but there was no semblance of a complete meeting. The two directors were really treating themselves and their co-shareholders as partners in a firm, and not as a company at all. How can they claim the benefit of the Companies (Consolidation) Act, 1908, unless they conform to its provisions ?

In *Salomon* v. *Salomon & Co.* (1) Lord Davey cannot have meant to say that a company is bound by the separate informal assents of all its individual members. Unless the matter is discussed at a complete meeting there is no certainty that each member has the opportunity of ascertaining the views of all the other members.

ASTBURY J. [after stating the facts and holding that everything had been done with the utmost bona fides and solely for the benefit of the company]. For the purposes of my judgment, I will assume that the defendant Reading and Botterill were not validly or formally appointed directors. But they believed that they were, and they continued during the remaining history of the company to act as such. I will assume again that the sealing of the debenture was quite irregular. The company had the benefit of the money. The debenture was issued with the assent of every shareholder, and the question is whether the plaintiffs, or rather the liquidator, ought to succeed in obtaining a declaration that the debenture and the resolution authorizing it were inoperative and invalid, so that the creditors may get the advantage of the defendant Reading's 1750*l.* and deprive him of the security on which he made that advance.

Unless I am bound by authority to give this relief I certainly do not propose to do so.

It is, however, suggested that I am so bound, because the shareholders' assent to the irregular transactions was not given at any actual meeting.

In *In re George Newman & Co.* (2) the chairman of a company in which substantially all the shares were held by himself and his family, purchased on behalf of the company

(1) [1897] A. C. 22, 57. (2) [1895] 1 Ch. 674.

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the right to a building agreement to be obtained from certain commissioners. The commissioners objected to the company as tenant, and proposed to substitute the chairman, who thereupon sold the benefit of the agreement to the company at an advance of 10,000*l.*, of which 7000*l.* was spent upon commissions and otherwise in order to obtain the agreement from the commissioners, and 3000*l.* was applied by the chairman to his own use. A further sum of 3500*l.* was spent by the chairman out of the company's assets upon his private house. These payments were made out of money borrowed by the company for the purpose of its business; they were sanctioned by resolutions of the directors, "and were approved of by all the shareholders." The articles contained no power to make presents to directors. Upon a summons taken out by the liquidator against the chairman it was held that he was not liable for the 7000*l.*, but was liable for the 3000*l.* and the 3500*l.*, first, because the shareholders for the time being had no power to authorize the making of presents to directors out of money borrowed by the company; secondly, because if there had been such power it could be exercised only at a "general meeting." Lindley L.J., delivering the judgment of Lord Halsbury, A. L. Smith L.J. and himself, said (1): "When the facts are understood both these sums were in truth presents by the directors out of the company's assets to [the chairman] with the consent of the other shareholders who were of age; and the question is whether these presents can be treated as valid against the liquidator on the winding up of the company, which is hopelessly insolvent and which was largely in debt when these presents were made. Vaughan Williams J. has held that they are unimpeachable, and he referred to . . . . *In re British Seamless Paper Box Co.* (2) as supporting his view. But that case is very unlike this. The directors there had allotted shares to some of themselves as fully paid up. The shares were, in fact, allotted in consideration of some patents taken over by the company; and an agreement to issue the shares as paid up was registered. The transaction, therefore, was intra vires, and it was taken

(1) [1895] 1 Ch. 684. (2) (1881) 17 Ch. D. 467.

to be so both by counsel and by the Court. Further, the transaction was perfectly honest throughout, and it was sanctioned by a general meeting of the company, which then consisted of only the directors and one other person, who assented to what was done. More than a year afterwards shares were issued to other people, and, the company being ultimately wound up, the liquidator sought to recover the nominal value of the shares, treating them, in fact, as not paid up. The Court held that this could not be done, because the transaction (being intra vires) was honest and was sanctioned by all the members of the company at the time. But in this case the presents made by the directors to . . . . their chairman, were made out of money borrowed by the company for the purposes of its business; and this money the directors had no right to apply in making presents to one of themselves. The transaction was a breach of trust by the whole of them; and even if all the shareholders could have sanctioned it, they never did so in such a way as to bind the company. It is true that this company was a small one, and is what is called a private company; but its corporate capacity cannot be ignored. Those who form such companies obtain great advantages, but accompanied by some disadvantages. A registered company cannot do anything which all its members think expedient, and which, apart from the law relating to incorporated companies, they might lawfully do. An incorporated company's assets are its property and not the property of the shareholders for the time being; and, if the directors misapply those assets by applying them to purposes for which they cannot be lawfully applied by the company itself, the company can make them liable for such misapplication as soon as any one properly sets the company in motion." Later on he said (1): "Directors have no right to be paid for their services, and cannot pay themselves or each other, or make presents to themselves out of the company's assets, unless authorized so to do by the instrument which regulates the company or by the shareholders at a properly convened meeting. The shareholders at a meeting

(1) [1895] 1 Ch. 686.

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duly convened for the purpose, can, if they think proper, remunerate directors for their trouble or make presents to them for their services out of assets properly divisible amongst the shareholders themselves. . . . . But to make presents . . . . out of money borrowed by the company is a very different matter. Such money cannot be lawfully divided amongst the shareholders themselves, nor can it be given away by them for nothing to their directors so as to bind the company in its corporate capacity. But even if the shareholders in general meeting could have sanctioned the making of these presents, no general meeting to consider the subject was ever held. It may be true, and probably is true, that a meeting, if held, would have done anything which [the chairman] desired; but this is pure speculation, and the liquidator, as representing the company in its corporate capacity, is entitled to insist upon and to have the benefit of the fact that even if a general meeting could have sanctioned what was done, such sanction was never obtained. Individual assents given separately may preclude those who give them from complaining of what they have sanctioned; but for the purpose of binding a company in its corporate capacity individual assents given separately are not equivalent to the assent of a meeting. The company is entitled to the protection afforded by a duly convened meeting, and by a resolution properly considered and carried and duly recorded. The articles of this company, wide as they are, do not authorize such presents as those impeached by the liquidator."

Now all Lindley L.J.'s statements, both with regard to *In re British Seamless Paper Box Co.* (1) and *In re George Newman & Co.* (2) then before him, are made with reference to the particular facts which he states. It is quite true that in reciting the facts of the former case he states that the transaction was sanctioned by a general meeting, but he does not in any way rely on that fact. The plaintiffs suggest that this was the whole point of his decision. But what he really means is that where a transaction is intra vires the company and honest the sanction of all the members of the company,

(1) 17 Ch. D. 467. (2) [1895] 1 Ch. 674, 684, 686.

however expressed, is sufficient to validate it, especially if it is a transaction entered into for the benefit of the company itself.

In *In re Express Engineering Works* (1), a syndicate of five persons formed a private company, in which they were the sole shareholders, and sold to it for 15,000*l.* in debentures of the company property which they had, a few days before, acquired for 7000*l.* The contract for the sale and the issue of the debentures was carried out at a meeting of the five, who there and then appointed themselves directors. This meeting was described in the minutes as a board meeting. At a subsequent meeting the company's seal was affixed to the debentures. The articles provided that no director should vote in respect of any contract or arrangement in which he might be interested. On the liquidator claiming a declaration that the issue of the debentures was invalid, it was held, there being no suggestion of fraud, that the company was bound in a matter intra vires by the unanimous agreement of its members. Although the meeting was styled a directors' meeting, all the five shareholders were present, and they might well have turned it into a general meeting and transacted the same business. In these circumstances the issue of the debentures was not invalid. Lord Sterndale M.R., who was referred to *In re George Newman & Co.* (2) in the same way that I have been, said : "There were, however, two differences between that case and the present one. First, the transaction there was ultra vires, and, secondly, in that case there never was a meeting of the corporators. In the present case these five persons were all the corporators of the company and they did all meet, and did all agree that these debentures should be issued. Therefore it seems that the case came within the meaning of what was said by Lord Davey in *Salomon* v. *Salomon & Co.* (3): 'I think it an inevitable inference from the circumstances of the case that every member of the company assented to the purchase, and the company is bound in a matter intra vires

(1) [1920] 1 Ch. 466, 470. (2) [1895] 1 Ch. 674, 684, 686.
(3) [1897] A. C. 22, 57.

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by the unanimous agreement of its members.' It is true that a different question was there under discussion, but I am of opinion that this case falls within what Lord Davey said. It was said here that the meeting was a directors' meeting, but it might well be considered a general meeting of the company, for although it was referred to in the minutes as a board meeting, yet if the five persons present had said, 'We will now constitute this a general meeting,' it would have been within their powers to do so, and it appears to me that that was in fact what they did." Warrington and Younger L.JJ. said the same thing.

All three judges no doubt refer to the fact that there had been a meeting. But I cannot think that they came to their decision because the five shareholders happened to meet together in one room or one place, as distinct from agreeing to the transaction inter se in such manner as they thought fit. Warrington L.J. said: "It was competent to [the shareholders] to waive all formalities as regards notice of meetings, etc., and to resolve themselves into a meeting of shareholders and unanimously pass the resolution in question." He is there speaking of the actual facts before him.

Now the view I take of both these decisions is that where the transaction is intra vires and honest, and especially if it is for the benefit of the company, it cannot be upset if the assent of all the corporators is given to it. I do not think it matters in the least whether that assent is given at different times or simultaneously.

The plaintiffs contend that the two directors acted throughout as if they were partners, and cannot now turn round and shelter themselves behind the company law. I do not take this view. If company law enables the entirety of the corporators to ratify an irregular intra vires transaction why should this not protect an honest bona fide intra vires transaction entered into for the benefit of the company?

I can find nothing in *In re George Newman & Co.* (1) to

(1) [1895] 1 Ch. 674, 684, 686. N.B.—See also *Ho Tung* v. *Man on Insurance Co.* [1902] A. C. 232, 236.

prevent all the corporators from arranging to carry out an honest intra vires transaction entered into for the benefit of the company, even if they do not meet together in one room or place, but all of them merely discuss and agree to it one with another separately. The action is misconceived, and must be dismissed with costs.

Solicitors: *James, Mellor & Coleman, for Phipps & Troup, Northampton; Roscoe & Hincks, for T. J. Parker & Son, Wellingborough.*

G. R. A.

In re CRAVEN SETTLED ESTATES.

[1926. C. 2176.]

Settled Land—No Life-tenant—Statutory Owner with protected life Interest—Life-tenant's Powers conferred by Settlement on statutory Owner—Refusal to exercise—No Jurisdiction to authorize Trustees to exercise on his Behalf—Release of Powers—Effect of Release—Settled Land Act, 1925 (15 *Geo.* 5, *c.* 18), *s.* 20; *s.* 23, *sub-s.* 1; *s.* 24, *sub-s.* 1; *s.* 104, *sub-s.* 1; *s.* 117, *sub-s.* 1, *clauses xxvi., xxviii.—Law of Property Act,* 1925 (15 *Geo.* 5, *c.* 20), *s.* 155.

Under a resettlement of 1919 and in the events that happened the 5th Earl of Craven was entitled to a protected life interest in the net rents and profits of the Craven estates, but he had never been a life-tenant proper, or a limited owner with an estate or interest in possession having the powers of a life-tenant under s. 20 of the Settled Land Act, 1925, or s. 58 of the 1882 Act.

He was however given a life-tenant's powers by the resettlement, and had therefore full life-tenant powers under s. 23, sub-s. 1 (*a*).

With the concurrence of the trustees he desired to be relieved of these powers:—

Held, that the Earl, though having a life-tenant's powers under s. 23, sub-s. 1 (*a*), was not a life-tenant within the definition of s. 117, sub-s. 1, cl. xxviii., but only a statutory owner under cl. xxvi.

Held therefore that the Court could not make an order under s. 24, sub-s. 1, authorizing the trustees to exercise the powers on the Earl's behalf, as that section was confined to life-tenants proper or limited owners with an estate or interest in possession having life-tenant powers under s. 20, and did not apply to a mere statutory owner.

Held however that s. 104, sub-s. 1, which prevents a life-tenant releasing his powers, was similarly confined to those life-tenants or limited owners, and did not apply to a mere statutory owner.

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Held therefore that the Earl could release his powers by deed under s. 155 of the Law of Property Act, 1925, and that on his so doing s. 23, sub-s. 1 (*a*), of the Settled Land Act, 1925, would cease to operate, and the trustees would have a life-tenant's powers under sub-s. 1 (*b*).

ORIGINATING SUMMONS.

Under and by virtue of a settlement of April 13, 1893, a disentailing deed of February 10, 1919, and a resettlement of February 11, 1919, and in the events that had happened the 5th Earl of Craven was entitled to a protected life interest in the net rents and profits of the Craven Estates, with remainder to his infant son, Viscount Uffington, for life with remainders over.

The Earl had never been a life-tenant proper or a limited owner, with an estate or interest in possession, having the powers of a life-tenant under s. 58 of the Settled Land Act, 1882 (45 & 46 Vict. c. 38), now s. 20 of the Settled Land Act, 1925, but under the express terms of the resettlement, as construed by Lawrence J. on June 22, 1923, in *In re Craven's Resettlement* (1), he had the same Settled Land Act powers as if he were life-tenant in possession.

The Earl, who was much out of England, desired to be relieved of any duties or responsibility in regard to the settled estates, as he considered that the Settled Land Act trustees were the proper persons to manage them and to execute all powers. The trustees were willing to adopt this course, which they considered best for all parties interested if it could legally be done.

On June 16, 1926, the Earl issued this summons against the Settled Land Act trustees and the infant remainderman, asking various alternative orders and declarations, including :—

(*a*) An order under s. 24, sub-s. 1, of the Settled Land Act, 1925, authorizing the trustees to exercise a life-tenant's powers in the Earl's name and on his behalf.

(*b*) Alternatively a declaration that upon the Earl by deed releasing the powers of a life-tenant expressed to be conferred on him by the compound settlement and resettlement during such period as there was no life-tenant, the

(1) 1923. C. 1470.

trustees would have a life-tenant's powers under s. 23, sub-s. 1 (*b*).

Jenkins K.C. and *Dighton Pollock* for the Earl. The Earl having Settled Land Act powers conferred by the resettlement has a life-tenant's powers under s. 23, sub-s. 1 (*a*), of the Settled Land Act, 1925, and is therefore a life-tenant under s. 117, sub-s. 1, cl. xxviii. He wishes to be relieved of responsibility, and asks for and consents to an order under s. 24, sub-s. 1, authorizing the trustees to exercise these powers on his behalf.

It is suggested however that he is not a life-tenant under cl. xxviii., but only a statutory owner under cl. xxvi., and that s. 24, sub-s. 1, does not mention and therefore does not apply to a mere statutory owner. If that is so, it follows that s. 104, sub-s. 1, which prohibits a life-tenant from assigning or releasing his powers does not apply to a statutory owner, and there is nothing to prevent the Earl from releasing his powers under s. 155 of the Law of Property Act, 1925. In that case s. 23, sub-s. 1 (*a*), of the Settled Land Act, 1925, will cease to operate, and the trustees will have the powers under sub-s. 1 (*b*).

Archer K.C. and *Beebee* for the trustees. It is quite clear that the Earl's wishes can be effected in one of these methods. Probably the best course would be for the Court to treat the matter as a dilemma and make an alternative order and declaration without deciding which alternative is correct.

Topham K.C. and *Tillard* for the infant remainderman. It would be better to decide the point now, one way or the other.

Sect. 24, sub-s. 1, prima facie applies to an adult life-tenant under s. 19, sub-s. 1, and an adult limited owner with an estate or interest in possession having a life-tenant's powers under s. 20. There is obviously no life-tenant in that sense, and the present Earl is merely a statutory owner under s. 117, sub-s. 1, cl. xxvi.—i.e., a person who, when there is no life-tenant, has a life-tenant's powers under the Act—namely, by virtue of s. 23, sub-s. 1 (*a*). Being a statutory owner he

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is expressly excluded from the definition of life-tenant in cl. xxvi. Sect. 24 therefore does not apply. When the statute intends a provision to apply to statutory owners it expressly mentions them—e.g., s. 107.

There is no difficulty however in his releasing his powers under s. 155 of the Law of Property Act, 1925, as s. 104, sub-s. 1, of the Settled Land Act, 1925, does not prohibit a statutory owner from doing so. Sect. 23, sub-s. 1 (*a*), will then cease to operate, and the trustees will have the powers under sub-s. 1 (*b*).

The probable reason for the distinction made between life-tenants and statutory owners is that statutory owners are usually a fluctuating body like trustees in whom the powers vest and revest from time to time, whereas a life-tenant is a definite person who prima facie ought not to divest himself of his powers.

ASTBURY J. [after stating the facts:] For reasons which it is unnecessary to state, the Earl and all parties interested in the settled estates desire that the Settled Land Act powers shall be exercised in the future by the settlement trustees if that can be effected. Whether this can be brought about or not depends apparently on a number of sections of the Settled Land Act, 1925, and upon s. 155 of the Law of Property Act, 1925.

Under s. 20 of the Settled Land Act, 1925, certain adult limited owners with an estate or interest in possession of the nature therein described are given a life-tenant's powers.

Sect. 23, sub-s. 1, provides that where under a settlement there is no life-tenant nor, independently of this section, a person having by virtue of this Act the powers of a life-tenant then: (*a*) any person of full age on whom such powers are by the settlement expressed to be conferred; and (*b*) in any other case the trustees of the settlement shall have the powers of a life-tenant under this Act.

Sect. 104 provides (sub-s. 1) that the powers under this Act of a life-tenant are not capable of assignment or release

and (sub-s. 2) that a contract by a life-tenant not to exercise those powers shall be void.

Sect. 24, sub-s. 1, however, provides that if it is shown to the satisfaction of the Court that a life-tenant, who has by reason of bankruptcy, assignment, incumbrance, or otherwise ceased in the opinion of the Court to have a substantial interest in his estate or interest in the settled land or any part thereof, has unreasonably refused to exercise any of the powers conferred on him by this Act, or consents to an order under this section, the Court may, on the application of any person interested in the settled land or the part thereof affected, make an order authorizing the settlement trustees to exercise, in the name and on behalf of the life-tenant, any of a life-tenant's powers under this Act. It is plain therefore that although the life-tenant's powers cannot be released or got rid of the Court may in the cases mentioned make an order under s. 24, sub-s. 1.

The difficulty, if any, in the present case exists by reason of the definitions of life-tenant and statutory owner in s. 117, sub-s. 1, which provides that in this Act, "unless the context otherwise requires," the following expressions have the meanings hereby assigned to them.

By cl. xxviii. "life-tenant" includes a person (not being a statutory owner) who has the powers of a life-tenant under this Act.

By cl. xxvi. "statutory owner" means the trustees of the settlement or other persons who, during a minority, or at any other time when there is no life-tenant, have the powers of a life-tenant under this Act.

At first sight it is a little difficult to determine exactly what these two clauses mean. There is no doubt that life-tenant under the Act, unless the context otherwise requires, means a life-tenant proper or a person who has the powers of a life-tenant under the Act and is not a statutory owner. Statutory owner however means (inter alia) a person who when there is no life-tenant has the powers of a life-tenant under the Act.

The true clue to the meaning of these clauses may be that

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the policy of the Act is to differentiate life-tenants proper and other persons such as the limited owners with an estate or interest in possession referred to in s. 20 who are given a life-tenant's powers, from people not in either of those categories who are nevertheless statutory owners within cl. xxviii.

Now s. 24, sub-s. 1, only refers to a life-tenant, and if I am right in my construction of the definition clauses xxvi. and xxviii. that means a life-tenant or a person having a life-tenant's powers—e.g., under s. 20—provided that he is not a statutory owner. In other words s. 24, sub-s. 1, refers to life-tenants proper and persons having the powers of life-tenants in the full sense. It does not refer to persons who have a life-tenant's powers, but have no estate or interest. These are termed statutory owners.

This being the true construction of s. 24, sub-s. 1, it is impossible for the Court in the present case to make an order under that section because the Earl is not a life-tenant or a person (other than a statutory owner) with a life-tenant's powers.

A similar construction must be given to s. 104, sub-s. 1, which provides that the powers under this Act of a life-tenant are not capable of assignment or release. Reading in the definition of life-tenant, that means that no life-tenant or person with a life-tenant's powers (not being a statutory owner) may release or assign his powers, but there is not the same reason apparently why any such prohibition should affect a statutory owner.

That this is the proper construction to adopt is exemplified by the different language of s. 107, which provides that a life-tenant or "statutory owner" shall, in exercising any power under this Act, have regard to the interests of all parties entitled under the settlement. Where therefore the statute desires to include a statutory owner, who may have a life-tenant's powers, as well as a life-tenant proper or a person with a life-tenant's powers (not being a statutory owner), it does so expressly. In other words ss. 24 and 104 refer to life-tenants other than statutory owners, and do not include statutory owners who are not mentioned.

That being the true construction of s. 104, sub-s. 1, there is no prohibition against a statutory owner releasing his powers. There is apparently no reason for any such prohibition, and in its absence a statutory owner comes directly within s. 155 of the Law of Property Act, 1925, which provides that "a person to whom any power, whether coupled with an interest or not, is given may by deed release, or contract not to exercise, the powers."

For these reasons I am of opinion that the Earl can release his powers as statutory owner, and on his so doing s. 23, sub-s. 1 (*a*), will cease to operate, and the trustees of the settlement will have a life-tenant's powers under s. 23, sub-s. 1 (*b*).

The proper order in these circumstances will be to declare that upon the Earl by deed releasing the powers of a life-tenant expressed to be conferred on him by the compound settlement and resettlement during such period as there is no life-tenant thereunder the trustees of the compound settlement and resettlement will have the powers of a life-tenant during such period in relation to these settled estates.

Solicitors: *Rider, Heaton, Meredith & Mills.*

G. R. A.

ROMER J.

1926

June 2, 3;
July 1.

In re QUINTIN DICK

LORD CLONCURRY *v.* FENTON.

[1924. D. 760.]

Will—Construction—Devise in strict Settlement—Name and Arms Clause—Gift over upon "refusal or neglect" to take Name and Arms of Testator—Failure through Ignorance of Existence of Will to comply with Condition—Estate not forfeited.

A testator who died in 1858 by his will devised and bequeathed real and personal estate to persons in succession in strict settlement, and directed that every person who should become entitled thereto should take and use the surname and arms of D., and that if any such person so becoming entitled should refuse or neglect to take and use such surname and arms within three months of becoming so entitled, the limitations to him should cease determine and be utterly void, and the estate should go and devolve to the person or persons next entitled in remainder, in the same manner as if the person whose estate should so cease and determine were dead.

Upon the death of a tenant for life without issue in 1923, a period of over a year elapsed before the next tenant in tail could be discovered. Eventually it was found that he was living in Canada, and had never heard of the terms or existence of the testator's will:—

Held, that being ignorant of the condition he could not be said either to have "refused" or "neglected" to comply with it. The expression "refuse or neglect" is not equivalent to "fail" or "omit," as it implies a conscious act of volition. The tenant in tail therefore had not forfeited the estate.

Partridge v. *Partridge* [1894] 1 Ch. 351 and *In re Edwards* [1910] 1 Ch. 541 followed.

Astley v. *Earl of Essex* (1874) L. R. 18 Eq. 290 distinguished.

ORIGINATING SUMMONS.

Quintin Dick, the testator, by his last will dated August 30, 1844, appointed executors and trustees thereof, and gave devised and bequeathed all his estate and effects, real and personal, unto his said trustees, upon trust to convert such part of his residuary real and personal estate as should not consist of money or Government securities for money into money, and to invest the same in the public stocks or funds of Great Britain in their names and to stand possessed of the same upon trust with the consent of the tenant for life for the time being to invest the same residuary estate in the purchase

of freehold lands of inheritance situate in Ireland either by one purchase, or at different times, to be vested in the trustees of his will upon the trusts and to and for the uses intents and purposes and under and subject to the provisoes, limitations, conditions and restrictions thereinafter declared: that was to say to the use of the testator's only sister Charlotte Anna Hume Dick (in the will called Charlotte Anne Hume) during her life, with remainders over to the use of her children and issue in tail male, and for default of such issue to the use of the son grandson or other more remote issue who should be the heir at law of his (the testator's) late aunt Mary Dick afterwards Mary Barrett for his life without impeachment of waste, and after his decease to the use of his sons successively in tail male, and for default of such issue to the use of the son grandson or other more remote male issue who should be the heir at law of his (the testator's) late aunt Hannah Dick, afterwards the wife of Acheson Thompson, for his life, with remainders over to his sons in tail male, with an ultimate remainder to the testator's own right heirs.

The will contained a name and arms clause, set out in full in the judgment, requiring every person who should become entitled to the property settled by the testator's will or his residuary estate to take and use the name and arms of Dick within three months of becoming so entitled, and directing that any person becoming so entitled who should "refuse or neglect" to take and use the name and arms of the testator within that period should forfeit his interest therein, and that the estate should go to the person next entitled in the same manner as if the person whose estate should so cease and determine were actually dead.

The testator died on March 26, 1858, and his will, together with a codicil thereto, was duly proved in the principal Probate Registry in Ireland on June 12, 1858. The testator's sister, Charlotte Anna Hume Dick, died on May 11, 1864, leaving issue surviving her. The last survivor of the male issue of Charlotte Anna Hume Dick was Quintin Dick the younger (hereinafter called Captain Quintin Dick), who succeeded as tenant for life on the death of his uncle William Wentworth

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Fitzwilliam Hume Dick, on September 15, 1892, and died on December 9, 1923, without leaving any issue surviving him. The summons was taken out by the plaintiffs, the then trustees of the testator's will, on April 1, 1924, and an inquiry was directed whether at the date of the death of Captain Quintin Dick any son grandson or other more remote male issue of Mary Barrett was living and was her heir at law, or would have been her heir at law if she had died immediately after the testator; and whether any such male issue who might be certified as the heir at law of Mary Barrett had a son who was living, or if dead had left male issue now living.

For a considerable time no surviving male issue of Mary Barrett could be discovered, but eventually the defendant William Henry Barrett, who was resident at Port Dover, Ontario, Canada, was found, and proved that he was a descendant of Mary Barrett.

The Master by his certificate dated November 16, 1925, certified that at the date of the death of Captain Quintin Dick, no son grandson or other more remote male issue of Mary Barrett was living and was her heir at law, but at the same date the son grandson or other more remote male issue of the said Mary Barrett, who would have been her heir at law if she had died immediately after the death of Quintin Dick the younger, was the defendant William Henry Barrett.

The defendant William Henry Barrett, who was born in the lifetime of the testator, was twice married. By his first wife he had a son, the defendant Theobald Butler Barrett, who was married in 1920, and had three children, the eldest being the defendant Harry Bemister Barrett, born in 1922.

For nearly two years after the death of Captain Quintin Dick, the defendant William Butler Barrett remained in ignorance of his claims under and of the existence of the testator's will. The question then arose whether he could be said to have "refused or neglected" to comply with the condition therein contained to take and use the name and arms of Dick within three months after becoming entitled to the testator's estates.

Manning K.C. and *J. V. Nesbitt* for the trustees. The question is whether the defendant W. H. Barrett has, in the events which have happened, forfeited his estate through "neglect" or "refusal" to take the testator's name and arms, though he knew nothing of the testator or of his will.

Gavin Simonds K.C. and *McMullan* for the defendant Fenton, legal personal representative of Captain Quintin Dick, appointed to represent remaindermen entitled under limitations subsequent to W. H. Barrett's estate tail.

There are three questions. The first is whether the persons who became entitled in possession upon the death of the late Captain Quintin Dick "refused or neglected" to comply with the condition set out in the name and arms clause. The second is whether the final words "were actually dead," not being followed by words such as "without issue," the condition is repugnant to the estate and therefore void. Assuming that these points are decided in favour of the remaindermen, the third question remains whether if the estate has been forfeited, it descends to the testator's heir at law, or whether it goes over to the persons entitled in remainder.

The defendant W. A. Barrett knew nothing about the conditions of the will until more than three months after the death of Captain Quintin Dick.

The settlor's intention was absolute—i.e., that the person who inherited the property should, without fail, take his name and arms within three months of succeeding to it. Neglect means "nec legere"—"not to pick up." (1) The word may connote carelessness; on the other hand it may connote nothing more than omission to do something. It does not connote knowledge of that which ought to be done and failure to do it: *Lady Anne Fry's Case* (2); *In re Hodges' Legacy* (3); *Astley* v. *Earl of Essex* (4); *Doe* v. *Beauclerk* (5); *In re Bostock's Settlement* (6); *Hawkes* v. *Baldwin* (7); Davidson's Precedents

(1) Neglegens dictus est non legens, neque dilectum habens quid facere debeat, omissa ratione officii sui: Festus *ap.* Forcellini *s.v.*
(2) (1671) 1 Vent. 199.
(3) (1873) L. R. 16 Eq. 92.
(4) L. R. 18 Eq. 290.
(5) (1809) 11 East, 657.
(6) [1921] 2 Ch. 469.
(7) (1838) 9 Sim. 355.

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in Conveyancing, 3rd ed., vol. iii., p. 363, note ; *Partridge* v. *Partridge* (1) ; *In re Edwards.* (2)

On the second point an attempt to defeat an estate tail by using the words here used is bad in law. The introduction of the words " as if they were actually dead " does not affect the matter. The property goes to the persons entitled in remainder : Fearne on Contingent Remainders, 10th ed., vol. i., p. 252. On this point see Davidson's Precedents in Conveyancing, 2nd ed., vol. iii., Part I., p. 227 ; Jarman on Wills, 6th ed., pp. 492, 581 ; *Seymour* v. *Vernon.* (3)

On the third point, if the defendant W. H. Barrett " neglected " to comply with the condition and it is not repugnant, the estate does not descend to his son or his grandson. But if our contention is wrong, the estate tail is wholly defeated.

Sir Thomas Hughes K.C. and *Andrewes-Uthwatt* for the tenant in tail, W. H. Barrett. The condition being a condition of forfeiture must be construed most strictly against any one who would take advantage of its non-performance. The clause must be clear and unambiguous, and the gift over must exactly fit. A clause of forfeiture of the estate of a tenant in tail, which would not defeat subsequent estates to his issue, is void. A gift over of an estate tail in the same manner as if the tenant in tail were dead is prima facie repugnant.

If the latter contention is sound, that is sufficient. The present clause is within *Lady Anne Fry's Case* (4), and is void in its reference to a tenant in tail, though it would be good as regards a tenant for life.

Finally the words " to refuse or neglect " cannot apply to a case where the party in question has no knowledge either of the devise or the condition. This is clearly so as regards the word " refuse." The word " neglect " here must be taken in conjunction with the word " refuse." A person cannot neglect that in respect of which he has neither exercised nor failed to exercise his will. " Neglect " is not equivalent

(1) [1894] 1 Ch. 351.
(2) [1910] 1 Ch. 541, 546.
(3) (1864) 10 Jur. (N. S.) 487.
(4) 1 Vent. 199.

to "fail" or "omit." *King* v. *Burrell* (1); *Reg.* v. *Ryland* (2); *In re Richmond Gas Co. and Richmond Corporation* (3); *In re London and Paris Banking Corporation* (4); *In re Conington's Will.* (5)

A note in a text-book such as Davidson's Precedents is no authority on the construction of the clause referred to. The observation in Davidson that "neglect covers every form of omission" is unsupported by authority, and is unsound. In any case it does not contemplate the case where, as here, the person concerned is ignorant of the condition: see *Doe* v. *Hawke* (6); *Doe* v. *Beauclerk.* (7)

Time does not begin to run against the devisee until he gets notice of the condition. The name and arms clause as drawn, ever since 1844, provides that the estate tail shall cease as if the tenant in tail were dead. It is suggested that on the construction of the will, the words "without issue to inherit" should be introduced. Words are occasionally supplied by the Court in a will, but it has never been held that words can be supplied in order to make a forfeiture effective. The death of a tenant in tail is not a cesser of the estate, which goes on to the issue of the tenant in tail: *Corbet's Case* (8); *Mildmay's Case* (9); Fearne on Contingent Remainders, 10th ed., vol. i., p. 255, commenting on these two cases. The shifting limitation must be consistent throughout; the clause must fit together without any ambiguity of any kind.

[They referred to Sanders on Uses (1844), p. 130; Davidson's Precedents, 3rd ed., vol. iii., p. 1001; *Re Catt's Trusts* (10); *Musgrave* v. *Brooke* (11); *Bird* v. *Johnson* (12); Roper on Legacies, 4th ed., p. 183; *In re Hodges' Legacy.* (13)]

To sum up. In the first place the condition is void as

(1) (1840) 12 Ad. & E. 460, 467, 468.
(2) (1867) L. R. 1 C. C. 99.
(3) [1893] 1 Q. B. 56.
(4) (1874) L. R. 19 Eq. 444.
(5) (1860) 8 W. R. 444.
(6) (1802) 2 East, 481.
(7) 11 East, 657.
(8) (1599) 1 Rep. 83*b*.
(9) (1605) 6 Rep. 40*a*.
(10) (1864) 2 H. & M. 46.
(11) (1884) 26 Ch. D. 792.
(12) (1854) 18 Jur. 976.
(13) L. R. 16 Eq. 92.

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applied to a tenant in tail; but assuming it to be valid, he cannot be said to have refused or neglected to comply with it.

C. J. Farwell K.C. and *A. H. Droop* for the defendant Theobald Butler Barrett, son of the last defendant.

This defendant is not directly interested in the question now raised, only indirectly, but supports the argument on behalf of the defendant William Henry Barrett. The condition is not a valid condition. If a person does not know that he has to do a certain act he cannot be said to neglect it.

Gover K.C. and *Meyrick Beebee* for Henry Bemister Barrett, the infant grandson of the defendant William Henry Barrett.

If the condition is to be treated as void, then *Corbet's Case* (1) applies, and that does not help this defendant. The other reading would offend against the rule prohibiting a devise to the unborn son of an unborn person. The Court has to ask the question, not what any particular words mean generally, but what did this testator mean by using the words "refuse or neglect" in this particular will? If the words are capable of two different meanings, the Court should not adopt that meaning which would lead to a fantastic result: *In re Roberts* (2); *In re Whitmore.* (3) The word "neglect" involves a conscious act of volition.

The construction should be adopted which will not give such harsh and unreasonable results as the testator can never have intended.

Gavin Simonds K.C. in reply. The intention of the testator was that the estate should go on certain lines, and subject to certain conditions, but the Court cannot speculate which of these conditions was predominant in his mind. The words "neglect and refuse" have been used in conveyancing precedents for over eighty years, to cover every kind of omission, as a common form.

The testator has not, as suggested, attempted to do anything he could not do, but something that he was entitled to do—namely, to destroy the estate tail and relimit the estates upon other uses. The words are "the limitation shall cease determine and be utterly void."

(1) 1 Rep. 83*b*. (2) [1903] 2 Ch. 200, 204. (3) [1902] 2 Ch. 66, 70.

In re Hodges' Legacy (1) is a direct authority in favour of my contention, and there is no direct authority to the contrary.

Cur. adv. vult.

July 1. ROMER J. The particular question that I am now called upon to determine is one of many that have arisen in the course of ascertaining who are entitled to the real and personal estate of a testator called Quintin Dick, who died as long ago as the year 1858.

By his will the testator directed that the freehold lands that should be purchased by his trustees with his residuary estate as therein mentioned should be held to the use of his sister during her life, and after her death to the use of various persons and their male issue in strict settlement. The will contains a name and arms clause in the words following: "I do hereby order and direct and declare it to be my will and meaning that every person who shall be entitled to the possession and enjoyment of the said hereditaments or of my residuary estate under the limitations thereof as aforesaid after the decease of my sister shall and do within three months after he shall become entitled to the same as aforesaid take upon him, and use in all writings and on all occasions whatsoever the surname of Dick only, and use the arms of Dick only, and I do hereby direct that in case any person or persons so entitled as aforesaid shall refuse or neglect to take my said surname and arms and to use or take the proper means for so doing within the said period of three months then the limitations in this my will contained to him or them so refusing or neglecting as aforesaid shall cease determine and be utterly void and the same hereditaments and residuary estate shall in such case immediately go and devolve to the person or persons next beneficially entitled in remainder under the limitations aforesaid in the same manner as if the person or persons whose estate shall so cease and determine was or were actually dead."

The question that I have to determine is whether a person

(1) L. R. 16 Eq. 92.

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of the name of Barrett, who is alleged to have become entitled in the year 1923 to the possession of the settled property as tenant in tail male, in complete ignorance not only of the fact that he had so become entitled, but even of the very existence of the will and its contents, and who remained in such ignorance for a year or two thereafter, can be said to have "refused or neglected" to take the name and arms of Dick within the meaning of the clause. It is not disputed by him that ignorance of a condition cannot prevent a forfeiture clause for breach of the condition coming into operation. But he does contend that, inasmuch as the question of whether he should or should not take such name and arms was never presented to his mind, he cannot be said to have either refused or neglected to do so, and that the forfeiture clause accordingly never came into operation at all. It is contended on the other hand that the word "neglect" means no more than "fail" or "omit."

Now if the testator intended a forfeiture to take place in the event of a beneficiary failing to take the name and arms within the period of three months from his becoming entitled to the possession of the settled property I cannot understand why he did not say so. The word "fail" would without any doubt include every omission, whether the question of taking the name and arms presented itself to the mind of the beneficiary or not. It would therefore cover the case of a refusal, and the specific reference to a refusal would have been quite unnecessary. The testator must I think be taken to have had some reason for using the word "refuse" and to have used it deliberately, and the fact that he did use it suggests very strongly to my mind that he was directing his attention to the case of a beneficiary to whose mind the question had presented itself. If such a beneficiary in terms expressed his intention of not taking the name and arms, that would amount to a refusal. If, however, without expressing that intention, he merely omitted to comply with the condition, it might be doubtful whether in strictness he had refused or not. As to this see *Doe* v. *Beauclerk* (1), in

(1) 11 East, 657.

which it was said that a refusal imports that the thing refused was proposed to the refusing party, and *Doe* v. *Hawke* (1), in which Lawrence J. said that a refusal need not be express.

The testator might, therefore, very naturally add the word " neglect " to cover the case of a refusal that was not express. But I cannot think that it would be natural or in accordance with the ordinary use of language to add the word " neglect " in order to cover every case of failure. Although, therefore, as will presently appear, the word " neglect," when used by itself, may in certain contexts mean no more than the word " fail," I should not, in the absence of authority to the contrary, come to the conclusion that it has that wide meaning in the clause with which I have to deal. But my attention has been directed to certain authorities which I must now consider. Some of them certainly seem to establish the proposition that the word " neglect " may cover every form of omission. In others, however, the word has been treated as covering only omissions that are negligent. Amongst the former class are included *In re Hodges' Legacy* (2) and *Hawkes* v. *Baldwin*. (3) But in the first of these cases Wickens V.-C. did not in terms deal with the meaning of the word " neglect," though he undoubtedly was of the opinion that the word, even in a condition, included an omission due to ignorance. It would appear, however, that he treated the condition as being a condition precedent and not as a condition subsequent, failure to comply with which caused a forfeiture.

In *Hawkes* v. *Baldwin* (3) the testator, after giving certain legacies, declared that in case the said legatees or any or either of them " shall be dead at the time of my decease or shall not then be heard of to be then living or shall not respectively claim their respective legacies within twelve calendar months next after my decease then the legacies hereinbefore given to such of my respective legatees as shall be dead at the time of my decease or as shall neglect to claim the same within the time aforesaid shall sink into and form a part of my residuary

(1) 2 East, 481. (2) L. R. 16 Eq. 92.
(3) 9 Sim. 355.

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personal estate." It was held in the case of one of the legatees who, in consequence of her ignorance that the testator was dead, and accordingly of the contents of his will, did not claim her legacy within twelve calendar months from the testator's death, that she was not entitled to it. But it was quite clear, looking at the will as a whole, that in that case the words "neglect to claim" were used as being equivalent to "shall not claim."

The case of *Astley* v. *Earl of Essex* (1) was also cited as being an authority within the same class. But in that case the testator had directed that in case any person entitled to the possession of his real estate under the limitations of his will should neglect or fail to take and use a certain name and arms then the estate and interest of the person so failing should cease and determine and the testator's estates should immediately thereupon go over to the person next in remainder. It was held that a person who became entitled in possession in 1868, but knew nothing of his rights under the will until 1870 and had not complied with the name and arms clause, had forfeited his estate. He had however undoubtedly "failed" to take the name and arms, and it was not necessary to decide that he had "neglected" to comply with the condition.

In the latter class of cases there are those of *In re Richmond Gas Co. and Richmond Corporation* (2); *In re London and Paris Banking Corporation* (3); and *In re Conington's Will.* (4) The first two of these cases however were not dealing with conditions imposed by a will or settlement, and are not of much assistance in the present case. But in *In re Conington's Will* (4) the testator had devised lands to the use of the poor vicar of L. for ever upon condition that the vicar for the time being should read or cause to be read in the Parish Church morning prayer upon every Wednesday Friday and Holy-day throughout every year for ever, and the testator provided as follows: "It is my will that every vicar of L. which shall not hereafter fully and punctually observe and

(1) L. R. 18 Eq. 290.
(2) [1893] 1 Q. B. 56.
(3) L. R. 19 Eq. 444.
(4) 8 W. R. 444; 6 Jur. (N. S.) 992.

keep the condition aforesaid shall neither have nor receive any benefit or advantages by this my will during the residue of the term of his life natural. . . . . If any of the vicars or curates of L. aforesaid hereafter shall neglect in the least to read divine service when and where as before required, then it shall and may be lawful for the trustee to pay the profits of the land to the master of the free school of W. for and during the life natural of such negligent vicar of L." It was held by Wood V.-C. that the testator was looking to the case of wilful neglect. He was however of course assisted in arriving at that conclusion by the reference to the negligent vicar.

Having regard to these authorities it may well be that, if in the present case the gift over were directed to take effect if the person becoming entitled to the estate should neglect to take the name and arms within the defined period, the word "neglect" ought to be construed as including a mere omission or failure. In none of the cases however did the Court have to consider the words "refuse or neglect," and those are the words with which I have to deal. But Mr. Gavin Simonds very properly referred me to certain statements to be found in Davidson's Precedents and in Vaizey on Settlements. The Court in such cases as the present has always attached great weight to any established practice of conveyancers.

In Davidson's Precedents, 3rd ed., vol. iii., Part I., p. 358, there is the following passage in relation to the form of a name and arms clause: "The proviso of cesser and gift over of the estate . . . . are made operative on refusal or neglect to take the name and arms within the year"; and then, in a note on p. 363, there is the following statement: "The words 'refuse or neglect' no doubt cover every omission." Now if by the words "every omission" in this note it was intended to include an omission due to ignorance of the existence of the will, the statement would constitute a serious difficulty in the way of Sir Thomas Hughes' client. But the note goes on as follows: "Whether the word 'refuse' alone would do so, may be doubtful: see 2 East, p. 487; contra,

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11 East, 667." Now no one could suppose that a person who knew nothing about the will could be said to have "refused" to comply with the condition. That cannot be said to be doubtful. But it may well be doubtful, as already pointed out, whether a person to whose mind there was present the question of whether he should or should not comply with the condition, but who never expressly refused to do so, could be said to have "refused." I think therefore that I am justified in coming to the conclusion that the note was intended to be confined to those cases in which a person had knowledge of the will and to whose mind therefore the question must have presented itself of whether he should or should not comply with the condition.

In Vaizey on Settlements, vol. ii., p. 1277, there is this passage in reference to a name and arms clause: "'Refuse or neglect' no doubt covers every omission." The only authority given for the statement however is the note in Davidson to which I have just referred, and the learned author must I think be taken to have used the word "omission" in the same sense as that in which it appears to have been used in the authority that he cites.

So far then I can find nothing in the authorities or in the practice of conveyancers to suggest that the view I have taken of the meaning of the words "refuse or neglect" is not a correct one. On the contrary there are two authorities, to which I must now refer, which appear to me conclusively to support my own view. In *Partridge* v. *Partridge* (1) a testatrix, after devising real estate, including a mansion house, in strict settlement, added a proviso to the effect that every person who by virtue of the limitations therein-before contained should become entitled to the possession or to the receipt of the rents of the estate should within three months next after the death of the tenant for life reside in and occupy the mansion house for nine months at the least in every year, and she directed that in case any person who should become entitled in possession or to the receipt of the rents and profits should refuse or neglect to reside in

(1) [1894] 1 Ch. 351.

and occupy the mansion house, then the limitations therein-before contained of the estate to the use of him or her so refusing or neglecting should cease and the estate should go over to the person next in remainder under the limitations of the will. The person who became entitled in possession after the death of the first tenant for life was an infant who did not in fact reside in or occupy the mansion house, and the question was as to whether he could be said to have refused or neglected to do so. It was held by North J. that he had refused or neglected, and in the course of his judgment he expressed himself as follows (1): "The only event mentioned is, if the person who becomes entitled to the estate 'refuses or neglects' to reside in the house; and an infant cannot 'refuse or neglect' to reside in a particular place if the persons to whom his legal custody and care are committed do not choose that he shall do so. The words are not if he 'omit' to reside, or if he 'does not reside,' but if he 'refuse or neglect' to reside; and, in my opinion, an infant, who cannot control or fix the place where he is to reside, cannot within the terms of this clause be said to 'refuse or neglect' to reside at the place mentioned"; and then later he said: "As I have already pointed out, there is merely a proviso to defeat a vested estate, and it is made to depend, not upon the taker of the estate not doing the thing mentioned, but upon his refusing or neglecting to do it." It is clear from this passage that North J. did not consider that the words "refuse or neglect" cover every form of omission, but merely apply to a case where the person has present to his mind the question of whether he will or will not comply with the condition. Inasmuch as an infant is not in a position to exercise his mind upon such a question, the clause did not apply to him. If the word "neglect" were to be treated as equivalent to "failure" or "omission," the decision would have been different, seeing that an infant can fail or omit as well as anybody else.

The other case is that of *In re Edwards*. (2) That was

(1) [1894] 1 Ch. 351, 359, 361.

(2) [1910] 1 Ch. 541, 550.

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a similar case to *Partridge* v. *Partridge* (1), except that Warrington J. had to deal with a name and arms clause and not a clause as to residence, and he held, following *Partridge* v. *Partridge* (1), that the words "refuse or neglect" involved an exercise of the will, and that, inasmuch as in law an infant had no power, except in certain special cases, to exercise a discretion in reference to a legal matter, the testator, in using those words, must be taken not to include an infant. After referring to *Partridge* v. *Partridge* (1), and holding that the decision in that case applied to a name and arms clause as well as to a clause as to residence, Warrington J. said: "Supposing this infant had—which is quite possible—become entitled to the estates as tenant in tail in possession a few days after his birth, could it by any possibility be said that an infant of that age had 'refused or neglected' to do the act in question? The expression 'refuse or neglect' involves the idea of some exercise of discretion, some exercise of will, on his part." If the word "neglect" connotes the exercise of the will it cannot include a failure or omission which is due to ignorance of the provisions of the document, and which therefore does not result from any operation of the mind.

For these reasons I come to the conclusion that Sir Thomas Hughes' client did not refuse or neglect to take the name and arms within the period mentioned, and I must so declare.

In these circumstances it is not necessary for me to express any opinion upon the interesting and difficult point as to whether the whole condition is not repugnant and void under the doctrine of *Corbet's Case.* (2)

Solicitors: *Arnold & Henry White; Rooper & Whately.*

(1) [1894] 1 Ch. 351. (2) 1 Rep. 83*b*.

A. R. T.

In re GRIFFITHS.

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[1926. G. 221.]

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April 29, 30; *May* 13.

Will—Construction—"By any deed or document anticipate charge assign or otherwise dispose of"—Forfeiture "upon the execution of any such charge or assignment"—Petition in Bankruptcy by Tenant for Life.

Under a will a sum of money was vested in trustees in trust to pay the income to J. for life, and it was declared that if he should "by any deed or document anticipate charge assign or otherwise dispose of" the income of the said sum, such deed or document should have no valid effect, and that upon the execution of any such charge or assignment the said sum should be divided among the children of J. then living in equal shares. J. presented a petition in bankruptcy and on the same day was adjudicated bankrupt on his own petition:—

Held, that the petition in bankruptcy did not purport in any way to "anticipate charge assign or dispose of" any property of the petitioner; that no forfeiture was occasioned upon its "execution"; and that the forfeiture clause had not taken effect.

In re Cotgrave [1903] 2 Ch. 705 doubted and distinguished.

Adjourned Summons.

The testator, John Griffiths, by his will dated January 26, 1924, gave the sum of 1000*l.* to his trustees in trust to invest and pay the income to Thomas Idris Jenkins during his life, and after his death to divide the said sum equally among such of his children as should be then living; and the testator declared that "if the said Thomas Idris Jenkins shall by any deed or document anticipate charge assign or otherwise dispose of the income of the said sum of one thousand pounds or any part thereof such deed or document shall have no valid effect as I hereby declare that the said sum of one thousand pounds shall upon the execution of any such charge or assignment be divided among the children of the said Thomas Idris Jenkins then living in equal shares." The testator died on May 11, 1924.

On November 20, 1917, the said Thomas Idris Jenkins was adjudicated a bankrupt on his own petition presented upon the same day. This summons was issued by the trustees of the will for the determination of the question whether

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upon the true construction of the will Thomas Idris Jenkins had forfeited his life interest in the above mentioned sum of 1000*l.* or the investments representing that sum and the said sum or investments became divisible between his children or whether such income was payable to his trustee in bankruptcy.

H. W. Clements for the plaintiffs.

Beebee for the children of the tenant for life. The bankrupt has incurred a forfeiture of his life interest. The point is covered by *In re Cotgrave* (1), where the learned judge came to the conclusion that a petition in bankruptcy and adjudication consequent thereon constituted an alienation.

[He also referred to *In re Amherst's Trusts* (2); Theobald on Wills, 7th ed., p. 634; and Jarman on Wills, 6th ed., p. 1498.]

Dighton Pollock for the Board of Trade. The Court has never strained the construction of such a clause to so great an extent as it is sought to strain the present clause. The circumstances relating to the alienation in *In re Cotgrave* (1) are altogether different from those in the present case: see also *Ex parte Dawes.* (3) All provisions of this nature must be construed strictly. Having regard to *In re Evans* (4) it is clear that the Court looks most carefully at such clauses. Here a deed or document immediately disposing of the property is essential if a forfeiture is to be incurred. The limiting words which distinguished this case from the other cases are "any deed or document." *In re Evans* (4) shows that it is necessary to ascertain and adhere to the strict grammatical meaning of the words.

Cur. adv. vult.

May 13. ROMER J. [after stating the facts continued:] It is alleged by the trustee in the bankruptcy of Thomas Idris Jenkins that he is entitled to receive the income of the fund representing the 1000*l.* during the life of Thomas Idris Jenkins. It is alleged on the other hand on the part of his

(1) [1903] 2 Ch. 705.
(2) (1872) L. R. 13 Eq. 464.
(3) (1886) 17 Q. B. D. 275.
(4) [1920] 2 Ch. 304.

children that by reason of his having been adjudicated a bankrupt upon his own petition Thomas Idris Jenkins incurred a forfeiture of his life interest under the directions in that behalf contained in the will. It is admitted by the trustee in bankruptcy that notwithstanding the words of futurity contained in the will a forfeiture would have been occasioned by any assignment of the income made in the testator's lifetime.

The trustee however contends that even if the presentation of the petition and the adjudication had taken place after the testator's death no forfeiture would have been thereby occasioned, and this is the point I have to determine.

The contention in favour of a forfeiture having taken place is based upon a decision of Kekewich J. in *In re Cotgrave* (1), in which that learned judge arrived at the conclusion that where a legatee was adjudicated a bankrupt upon his own petition, the petition and adjudication consequent thereon constituted an alienation of his legacy by the legatee. But, before considering that case, it will be convenient to refer to one or two earlier decisions. In *Shee* v. *Hale* (2) a testator directed payment to his son of a yearly sum during his life or until such time as his son should actually sign any instrument whereby or in which he should contract or agree to sell assign or otherwise part with the same or any part thereof . . . . or whereby or in which he should authorize or empower or intend to authorize or empower any person or persons whomsoever to receive such annuity or any part thereof except only as to the then next quarterly payment after such authority or power should be given. After the death of the testator the son took the benefit of an insolvent Act (41 Geo. 3, c. 70). It was held by Sir William Grant that the son had done an act to authorize or empower others to receive the annuity. Inasmuch as according to the strict terms of the will the annuity would only cease if the son signed an instrument whereby or in which he should authorize or empower others to receive the annuity I must suppose that Sir William Grant treated the schedule of property

(1) [1903] 2 Ch. 705. (2) (1807) 13 Ves. 404.

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signed by the legatee in accordance with the Act as being such an instrument. But under that Act a debtor who, having presented the necessary petition and given the necessary notices, could satisfy the justices that the schedule was accurate was entitled as of right to have it adjudged that he was entitled to the benefit of the Act. Thereupon he obtained his discharge from prison, and his property became vested in the clerk of the peace for the benefit of the creditors. When therefore the son, having complied with the necessary preliminaries, signed the schedule of his property, he signed a document which, having regard to the Act of Parliament, necessarily resulted in his property becoming vested in the clerk of the peace. The vesting was no doubt in one sense done by the Act of Parliament. But it rested with the debtor alone to decide whether such vesting should or should not take place. It was therefore in substance the debtor, and the debtor alone, who empowered the clerk of the peace to receive the annuity.

The next case to which I wish to refer is that of *Brandon* v. *Aston*. (1) In that case a testator bequeathed an annuity to one Nathan, declaring that it should cease if Nathan should attempt to sell mortgage incumber or anticipate the payment of the annuity. After the testator's death, Nathan, who was confined in Whitecross Street prison, filed his petition for discharge to the Court for the relief of insolvent debtors under s. 35 of 1 & 2 Vict. c. 110. The result of his so doing was that under s. 37 the Court became bound to make an order under which the whole of his property, with certain immaterial exceptions, became vested in the provisional assignee. In his petition the debtor was required to state his willingness that all his real and personal estate should be so vested. It was held by Knight Bruce V.-C. that Nathan had forfeited his annuity. The Vice-Chancellor said: "Now it is possible that there may be a case of insolvency which would not fall within the terms of this will. The present case, however, is one, if I may use the expression, of voluntary insolvency. It is the case of an application by a person for

(1) (1842) 2 Y. & C. Ch. 24, 28.

delivery from imprisonment upon certain conditions: it is his own act. He presents a petition to the Court for relief of insolvent debtors, stating his imprisonment, and that he is willing that all his real and personal estate and effects may be vested according to the provisions of the Act of Parliament. By so doing, he has, in effect, executed a Parliamentary power; that is, he has voluntarily elected to do that act which, being done, brings the provisions of the Act of Parliament into operation. In effect, therefore, the vesting order is procured by himself; for every substantial purpose it is his own act. I apprehend I should be deciding against the letter and spirit of this enactment if I were to hold that there has not been a clear attempt to incumber and anticipate payment of the annuity." There again the anticipation of the annuity was the act of the debtor alone. The statute gave him a power to anticipate in a particular way, and that power he executed by filing his petition.

Similar decisions in reference to the same statute are to be found in the books. But in *In re Amherst's Trusts* (1) the question came up for decision, whether a tenant for life of a fund, who presented a petition for liquidation of his affairs by arrangement under the Bankruptcy Act, 1869, had thereby "parted from" the income of the fund. It was held by Bacon V.-C. that he had. But by one of the rules under the Act of 1869 the Court had power at any time after presentation of the petition to appoint a receiver to take immediate possession of the property of the debtor, and the decision of the Vice-Chancellor was, as I understand it, based upon that consideration. He said: "I must hold that the presentation of this petition by this debtor, whereby he put into the power of the Court immediately to appoint a receiver of all his property was a 'parting from' his life interest in the fund." Although in that case the petition was followed by a resolution of the creditors in favour of a liquidation by arrangement and the appointment of a trustee in whom the property of the debtor thereupon vested by virtue of the provisions of the Act, the Vice-Chancellor did not hold that

(1) L. R. 13 Eq. 464, 469.

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by presenting the petition the debtor had assigned his life interest. So far as the assignment was concerned it was not the act of the debtor, though it might well be said to have been the act of the creditors, following the reasoning of Knight Bruce V.-C. in *Brandon* v. *Aston.* (1) But inasmuch as the debtor by presenting his petition had put it in the power of the Court to take possession of his property he had parted with his exclusive power over the income of the fund, and in that sense might, I suppose, be said to have "parted from" his income.

I must now turn to the case of *In re Cotgrave.* (2) In that case a testator gave a fund to trustees upon trust for a grandson for life, and declared that in the event of the grandson alienating or incumbering or agreeing to alienate or incumber the income he should thenceforth absolutely forfeit his interest. After the death of the testator the grandson filed his petition in bankruptcy, and on this petition he was adjudicated a bankrupt. It was held by Kekewich J. that the forfeiture clause had taken effect. The learned judge referred to *In re Amherst's Trusts* (3), and said that it was a direct authority that under the Bankruptcy Act of 1869 the presentation of a petition in bankruptcy by the tenant for life was sufficient to cause a forfeiture under a clause of the kind with which he was dealing. He added that the words of the two clauses were not precisely the same, but in point of substance were not distinguishable. But, as I have already pointed out, the actual decision of Bacon V.-C. was that the debtor had "parted from" his income by presenting a petition for liquidation of his affairs by arrangement and not that the presentation of the petition was an alienation of the income. It had moreover been pointed out by Cave J. in *Ex parte Dawes* (4) that a presentation by a debtor of a petition in bankruptcy under the Act of 1883 did not by itself amount to an assignment of any part of the debtor's property. Wright J. had stated the same thing in *Ex parte Lovell* (5), where, after referring to the cases under the Insolvents Relief

(1) 2 Y. & C. Ch. 24.
(2) [1903] 2 Ch. 705, 710.
(3) L. R. 13 Eq. 464, 469.
(4) 17 Q. B. D. 275.
(5) [1901] 2 K. B. 16, 22.

Acts, and to *In re Amherst's Trusts* (1), he said: "All those cases except *In re Amherst's Trusts* (1) were determined upon statutes under which the debtor's petition ipso facto effected an assignment of the debtor's property for the benefit of creditors; but under the Act of 1883, even upon a debtor's petition asking for adjudication, the adjudication does not follow automatically. The Court has a discretion in the matter, and, unless the Court in its discretion adjudicates, the creditors may prefer to accept a composition. Therefore Cave J., in *Ex parte Dawes* (2), held that the debtor's petition under the Act of 1883 did not of itself amount to an assignment. In that case the creditors had accepted a composition, so that there was no adjudication and no vesting of the debtor's property in a trustee; but the case seems to be an authority that the mere filing of a petition by a debtor is not of itself an assignment. And if so, then there is in any view no assignment until adjudication."

Both *Ex parte Lovell* (3) and *Ex parte Dawes* (2) were referred to by Kekewich J., and he read the passage from Wright J.'s judgment that I have just quoted. He then proceeded as follows: "Therefore he distinguished *In re Amherst's Trusts* (1), and thought that it was inapplicable to a case under the Act of 1883—that is to say, he thought the presentation of a petition was not in itself equivalent to an assignment. The learned judge's distinction does not apply to this case, because here the petition, though not followed automatically by adjudication, was in fact so followed; and though adjudication was not the necessary consequence, it was a consequence, and also the very consequence which was contemplated by the bankrupt. Though not automatically, it followed in the natural course of events, and because of his bankruptcy, which was his own act. It seems to me, therefore, that the principle of *In re Amherst's Trusts* (1) applies, and that here the petition was an 'alienation' causing a forfeiture under this will."

I have felt some difficulty in following this reasoning of

(1) L. R. 13 Eq. 464. (2) 17 Q. B. D. 275.
(3) [1901] 2 K. B. 16, 22.

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the learned judge. The adjudication was the act of the Court, which had a discretion in the matter, and, though the presentation of the petition by the debtor was an act by him setting the Court in motion, I cannot for myself understand how the adjudication and the consequent divesting of his property can be said to be an alienation by him. If the adjudication had been made on the petition of a creditor, could it truthfully be said that the creditor had alienated the debtor's property? Indeed if the alienation is to be regarded as the act of a person who is instrumental in bringing about an adjudication by the Court, it will be difficult to know where to stop. Supposing that a debtor files a declaration of his inability to pay his debts, and so commits an act of bankruptcy on which a creditor founds a petition on which an adjudication is made, is the consequent divesting of his property to be regarded as the act of the bankrupt? If it is not to be so regarded, it must be because an act of bankruptcy does not necessarily lead to an adjudication. But no more does the presentation of a petition, as pointed out by Wright J. There is in fact direct authority as to whether the commission by a debtor of an act of bankruptcy upon which a petition is founded and an adjudication is made constitutes an assignment by him of his property. In *Graham* v. *Lee* (1) one Henry Smith was to forfeit a legacy if he should assign, mortgage, or in any manner anticipate the same or attempt so to do. He got into pecuniary difficulties, and contemplated raising money on the legacy in order to satisfy his creditors, but was advised by his solicitor that he could not do so without forfeiting the legacy, and the matter fell through. Being still pressed by his creditors, Henry Smith and his partner made a declaration under the Bankrupt Act that they were not able to meet their engagements with their creditors, and on the same day on the petition of certain creditors they were declared bankrupts. It was contended that Henry Smith had forfeited his legacy. Sir John Romilly, however, decided that this was not so. He said: "A condition of forfeiture must be strictly

(1) (1857) 23 Beav. 388, 390.

construed, and here nothing is said as to bankruptcy being a ground of forfeiture. It is then said, that this declaration of insolvency, which was the foundation of the bankruptcy, was voluntary, but the same may be said of every act of bankruptcy." Henry Smith's declaration was undoubtedly made in the expectation that an adjudication in bankruptcy would shortly ensue.

The petition of the grandson in *In re Cotgrave* (1) was made in the same expectation. In both cases the debtor's expectation was in fact realized, though in both cases it might have been disappointed. Why in these circumstances the grandson is to be regarded as having alienated his legacy and Henry Smith acquitted of alienation it is difficult to understand. For myself I should, in both cases, have thought that the alienation was the act of the law and not the act of the debtor at all. If, however, the words of the forfeiture clause in the present case had been indistinguishable from those of the clause in *In re Cotgrave* (1), I might, notwithstanding my own doubts, have found it my duty to have followed the decision of Kekewich J., given over twenty years ago and, so far as I know, never since questioned. But the clause in the present case differs in one important respect from that with which Kekewich J. was dealing. No forfeiture is occasioned in the present case unless Thomas Idris Jenkins has dealt with the income of the trust fund by some deed or document, which, as I read the clause, must be some deed or document that purports to anticipate charge assign or otherwise dispose of such income. For the testator directs that the deed or document shall have no valid effect, which means, of course, no valid effect so far as the income is concerned, and that the forfeiture is to take effect upon the execution of such charge or assignment. This in my opinion means upon the execution of the deed or document creating the charge or assignment. Now, the petition in bankruptcy does not purport in any way to anticipate charge assign or dispose of any property of the petitioner at all, and most certainly no forfeiture was occasioned upon its execution.

(1) [1903] 2 Ch. 705.

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The most that could be extracted from *In re Cotgrave* (1) would be that the forfeiture was caused when the adjudication was made, but took effect as from the presentation of the petition. In the result I come to the conclusion that the forfeiture clause has not taken effect, and I must so declare.

Solicitors: *Gibbs, White & King, for W. H. Pethybridge, Cardiff; Solicitor to the Board of Trade.*

(1) [1903] 2 Ch. 705.

J. L. D.

END OF VOL. AND OF CHANCERY SERIES FOR 1926.

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—— *Wall* v. *London and Northern Assets Corporation* [1899] 1 Ch. 550.
Approved. WALL *v.* EXCHANGE INVESTMENT CORPORATION, LD. **C. A. 143**

—— *Walter* v. *Lane* [1900] A. C. 539.
Applied. BRITISH BROADCASTING CO. *v.* WIRELESS LEAGUE GAZETTE PUBLISHING CO. - **Astbury J. 433**

—— *Weatherby* v. *International Horse Agency* [1910] 2 Ch. 297.
Applied. BRITISH BROADCASTING CO. *v.* WIRELESS LEAGUE GAZETTE PUBLISHING CO. - **Astbury J. 433**

—— *Whittaker, Ex parte* (1875) L. R. 10 Ch. 446.
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—— *Wigan* v. *English and Scottish Law Life Assurance Association* [1909] 1 Ch. 291.
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—— *Wilkinson* v. *Levison* (1925) 42 Times L. R. 97.
Distinguished. GREENBERG *v.* COOPERSTEIN - **Tomlin J. 657**

—— *Wilton & Co.* v. *Phillips* (1903) 19 Times L. R. 390.
Followed. *In re* STOLLERY **C. A. 284**

—— *Wiltshire Iron Co., In re* (1868) L. R. 3 Ch. 443.
Applied. *In re* PARK WARD & CO., LD. - - **Romer J. 828**

—— *Wintle, In re* (1870) L. R. 9 Eq. 373.
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2. —— *Debenture Holders' Action—Insufficient Assets—Order of Administration of Assets—Companies (Consolidation) Act,* 1908 (8 *Edw.* 7, *c.* 69), *ss.* 107, 209.
In re GLYNCORRWG COLLIERY CO., LD. RAILWAY DEBENTURE AND GENERAL TRUST CO., LD. *v.* THE COMPANY **Tomlin J. 951**

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In re Cope (Benjamin) & Sons, Ld. [1914] 1 Ch. 800 explained and approved. *In re* AUTOMATIC BOTTLE MAKERS, LD. OSBORNE *v.* AUTOMATIC BOTTLE MAKERS, LD. **C. A. 412**

4. —— *Directors—"Casual vacancy"—Appointment by Board—"Qualified person"—Share Qualification—Transfer passed for Registration before Appointment—Actual Registration after Appointment—Invalidity of Appointment.*
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In re George Newman & Co. [1895] 1 Ch. 674, 684, 686 and *In re Express Engineering Works* [1920] 1 Ch. 466, 470 considered, explained, and applied. PARKER AND COOPER, LD. *v.* READING - - **Astbury J. 975**

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6. —— *Life Assurance Policies—Mortgages by Policy-holders to Company—Equitable Assignment of some Mortgages to Trustees—No Notice to Mortgagor—Winding Up—Mutual Credits—Set-off—Bankruptcy Act*, 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 31.

In re National Benefit Assurance Co. [1924] 2 Ch. 339 approved.

The decision in *Ex parte Price* (1875) L. R. 10 Ch. 648 not followed, being in the opinion of the Court inconsistent with the later decisions of the same Court in *Lee & Chapman's Case* (1885) 30 Ch. D. 216; *In re Daintrey* [1900] 1 Q. B. 546; and *In re Taylor* [1910] 1 K. B. 562. *Paddy* v. *Glutton* [1920] 2 Ch. 554 not adopted. *In re* City Life Assurance Co., Ld. Grandfield's Case. Stephenson's Case - **C. A. 191**

7. —— *Mortgage of Property and Assets—Winding Up—Interest paid to Mortgagee—Payment less Tax—Crown's Right as Creditor to Tax so deducted—Preferential or pari passu—"Assessed tax"—Whether "assessed" on Company—Deductions whether Moneys in Hands of Company or impressed with a fiduciary Character—Income Tax Act*, 1918 (8 & 9 *Geo.* 5, *c.* 40), *All Schedules Rules, rr.* 19, 21—*Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 209, *sub-ss.* 1 (*a*), 2, 3 *and* 4.

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8. —— *Shares — German National — Domicil of trading Corporation—Incorporation and registered Office in England—Administration of Business Abroad—"Property, rights, and interests" within His Majesty's Dominions—Statutory Charge—Treaty of Versailles, art.* 297 (*b*)—*Treaty of Peace Order*, 1919, *s.* 1, *sub-s. xvi.*

Attorney-General v. *Higgins* (1857) 2 H. & N. 339 and *Brassard* v. *Smith* [1925] A. C. 371 applied.

Bradbury v. *English Sewing Cotton Co., Ld.* [1923] A. C. 744, 753 distinguished. Baelz *v.* Public Trustee - **Eve J. 863**

9. —— *Special Resolution—Vote by Proxy—Objection disallowed by Chairman—Article of Association—Votes not disallowed to be deemed valid for all Purposes—Bona fide Decision of Chairman final.*

Wall v. *London and Northern Assets Corporation* [1899] 1 Ch. 550 approved. Wall *v.* Exchange Investment Corporation, Ld. - - - - - **C. A. 143**

10. —— *Unregistered Association—Association of more than Twenty Members—Association carrying on Business having for Object the Acquisition of Gain—Illegality—Administration of Assets—Right of Members to an Account—Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 1, *sub-s.* 2.

Shaw v. *Benson* (1883) 11 Q. B. D. 563 followed in part, but distinguished in part.

Barclay v. *Pearson* [1893] 2 Ch. 154 considered.

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11. —— *Winding Up—Debenture issued between Date of Presentation of Petition and Date of Winding-up Order—Knowledge of Presentation of Petition—Summons for Declaration of Validity of Debenture—Costs of Application—Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 205, *sub-s.* 2.

In re Wiltshire Iron Co. (1868) L. R. 3 Ch. 443 applied. *In re* Park Ward & Co., Ld. - - - - **Romer J. 828**

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Duck v. *Bates* (1884) 13 Q. B. D. 843 discussed. HARMS (INCORPORATED), LD., AND CHAPPELL & CO., LD. *v.* MARTANS CLUB, LD.
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University of London Press v. *University Tutorial Press* [1916] 2 Ch. 601, 608 (Examination Papers); *Walter* v. *Lane* [1900] A. C. 539, 552 (Report of Public Speech); *Collis* v. *Cater* (1898) 78 L. T. 613 (Chemist's Catalogue of Drugs); *Blacklock* v. *Pearson* [1915] 2 Ch. 376 (Bradshaw's Station Index); and *Weatherby* v. *International Horse Agency* [1910] 2 Ch. 297, 303, 304 (Stud Book List of Mares and Stallions) applied. BRITISH BROADCASTING CO. *v.* WIRELESS LEAGUE GAZETTE PUBLISHING CO.
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Gas Light and Coke Co. v. *South Metropolitan Gas Co.* (1889) 62 L. T. 126 and *Att.-Gen.* v. *West Gloucestershire Water Co.* [1909] 2 Ch. 338 distinguished.
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Wilton & Co. v. *Phillips* (1903) 19 Times L. R. 390; *In the Estate of Goodrich* [1904] P. 138; and *Brierley* v. *Brierley* [1918] P. 257 followed.

Bird v. *Keep* [1918] 2 K. B. 692 distinguished.

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Decision of Eve J. affirmed. *In re* Swinburne. Sutton *v.* Featherley **C. A. 38**

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In re O'Hara [1900] 2 I. R. 232, 240 applied. *In re* Thain (an Infant). *In re* M. M. Thain. Thain *v.* Taylor **Eve J. and C. A. 676**

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Dicta in *Anderson* v. *Oppenheimer* (1880) 5 Q. B. D. 602, 607, 608 and *Cohen* v. *Tannar* [1900] 2 Q. B. 609, 614 followed.

Decision of Russell J., ante, p. 109, affirmed. BOOTH *v.* THOMAS - **C. A. 397**

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Meader v. *West Cowes Local Board* [1892] 3 Ch. 18 distinguished. ATT.-GEN. *v.* PEACOCK - - - - **Eve J. 241**

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